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Municipal Liability on Contracts in California

By

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"Parties dealing with the authorities of a municipal corporation are chargeable with full knowledge of their powers, and act at their peril. If the authorities transcend their powers, the act is a nullity, by which the municipality is as much unaffected as if it were the act of a stranger."

Branham et al vs. *Mayor, etc., et al,* 24 Cal. at 604-5.

"The mode in such cases constitutes the measure of the power."

Field, Chief Justice in Zottman vs. *San Francisco,* 20 Cal. at 102.

"It may sometimes seem a hardship upon a contractor that all compensation for work done, etc., should be denied him; but it should be remembered that he, no less than the officers of the corporation, when he deals in a matter expressly provided for in the charter, is bound to see to it that the charter is complied with. If he neglect this, or choose to take the hazard, he is a mere volunteer, and suffers only what he ought to have anticipated. If the statute forbids the contract which he has made, he knows it, or ought to know, before he placed his money or services at hazard. The law never implies an obligation to do that which it forbids the party to agree to do."

Brady vs. *The Mayor, etc., of N. Y.,* 16 How. Pr. (N. Y.) at 446.

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Preface

The question of the liability of a municipality on a contract either express or implied, when the requirements of statute or charter as to the making of the contract, have not been complied with, has arisen so often in California, and has been answered by the Courts, either in decision or dicta, in so many apparently conflicting ways, that the language of Chief Justice Field in *Argenti* vs. *City of San Francisco,* 16 Cal. 255, at 283, may, at first sight, seem to be, to this day, appropriate:

"Indeed, upon the general subject of the extent of the liability of a municipal corporation, the authorities are a tangled web of contradictions, and it is difficult to assert any proposition with respect to the same for which adjudications on both sides may not be cited."

It has therefore been thought advisable by this office, to make a careful study of the question above indicated, and its related subjects, and an attempt has been made in this treatment of the matter, to give the adjudications of the California Supreme Court and District Court of Appeal, together with the language, that has been used by the different Justices of these Courts on the general liability of municipal corporations on such contracts.*

The subject very naturally divides itself into four main branches, all more or less correlated, but still pretty well distinguished by the Courts, and we shall therefore use the following outline:

First. The Implied Contract theory; i. e., the holding of a city liable on an implied contract because of benefits received, even though such a properly executed contract as would make the City liable on an express contract, was not made.

Second. The Estoppel theory—by which is meant the working of the doctrine of equitable estoppel against a municipality, which has received benefits, and which attempts to set up the defense of no valid contract executed.

Third. "The mode is the measure of the power." That is,

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*Note:—Chief Justice Beatty has, more than other single Justice, insisted upon the views of Chief Justice Field as expressed in the Zottman case

See infra, pages 34-5, his strong dissenting opinion in *Sac. Co.* vs. *S. P. Co.* 127 Cal. 217; and also see pages 50-2 infra, his equally as strong concurring opinion in *Contra Costa Water Co.* vs. *Breed,* 139 Cal. 432, in which the Chief Justice discusses his own opinion in *Higgins* vs. *San Diego Water Co.,* 118 Cal. 524, and his dissenting opinion in the above case of *Sac. Co.* vs. *S. P. Co.*

when a mode of making a contract is laid down in a municipal charter, or by statute, that mode must be strictly followed, in order to hold the City.

Fourth. The theory of Ratification; that is, can a contract, not properly made in the first place, be subsequently ratified, so as to hold the City?

PERCY V. LONG,
J. F. ENGLISH.

San Francisco, February 17, 1910.

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CHAPTER I.

LIABILITY OF MUNICIPAL CORPORATIONS ON IMPLIED CONTRACTS. 1.

A. The rule is sometimes stated, that if a city acts without its powers in making a contract and the contractor does the work under the contract for the city, the city is liable as on an implied contract. However, it is also stated in the same cases, that the city is not liable as on an implied contract, unless the benefits conferred are general, rather than local in their nature, or unless money, or property is received by the city, which does not belong to it. The rule being thus restricted when attempt is made to hold a municipal corporation, as distinguished from a private corporation, on an implied contract. 1.

1. Distinction between express and implied contracts. City can not however be estopped from setting up the invalidity of an express contract, when it acts entirely without its powers, even though there may be a recovery as on an implied contract. 9.

B. The better rule is that the city can not be liable as on an implied contract, when its officials in contracting have acted without their powers. 9.

1. Doctrine of power of election. One can not be charged with benefits received, on an implied contract, unless he has a power of freedom to elect whether he will retain the benefits,

which election will influence the conduct of the other party. 17.

2. *And the converse of this logically follows, to-wit, that a city can not escape liability as on an implied contract when the person giving value to the city has no power of election but is compelled by law to furnish services to the city. 18.*

3. *If by contract with city, party agrees that he will not hold the city liable he can not hold the city on the theory of benefits enjoyed, even though he is barred from other recovery, for his work done. 18.*

4. *But where there are no formal requisites for the making of a contract with the city and no question of city's exceeding its power is involved, a recovery may be had against the city on an implied contract. 18.*

5. *Change of circumstances. A contract with a city originally void for want of authority in the contracting city officials to make the contract, may become a valid obligation upon the part of the city, by a change of circumstances. For instance, a contract with a city attorney by which the city agrees to pay extra compensation for legal services, is void. But if the attorney at the close of his term of office continues to render services, the city may be held upon an implied contract. 20.*

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1. The prevailing rule is that if the city or its officers act entirely without its or their powers in making a contract the city and its officers are not estopped from denying the validity of the contract, even though the city has enjoyed the benefits of the contract, or the property of another. 22.

a. There is a distinction between a municipal and a private corporation as to doctrine of estoppel, the distinction being that the former is "organized for governmental purposes and invested with a portion of the authority which properly appertains to the sovereign power of the state, and can exercise only such powers as are expressly conferred or necessarily implied," while the latter is "organized for the profit of its members and its executed acts in purported furtherance of that object, unless restrained by its charter, or prohibited by positive law, will be upheld." (Von Schmidt vs. *Widber,* 105 Cal. at 157-8.) *27.*

b. Street Assessments. There are street assessment cases which in the principle contained are akin to those cases holding that the city is not estopped from denying the validity of a contract made absolutely without the

powers of the city. They generally arise from an attempt to foreclose the lien of a street assessment for street work actually done, when the original contract between the city and the street contractor is void. 28.

2. *There is but little authority for the contra rule to the effect that if a city actually enjoys the property and labor of a person contracting with it, and reaps the benefit from such use, it is estopped from denying that the agents of the city who made the contract had authority to so contract. Just as in the above discussed rule of liability of cities on implied contracts, so here, this rule against the city is seldom invoked by the courts. 29.*

   a. *There is a distinction between enjoying one isolated benefit, and a continuous course of benefits over a long period of time—the doctrine of estoppel being denied in the former and sometimes allowed in the latter case. 31.*

B. *When the city or its officials act within their powers in making an invalid contract. 32.*

1. *The prevailing rule, as in the case when a city acts without its powers is that the city is not estopped from setting up the invalidity of the contract, even though it was acting within its powers, and even though it has enjoyed the benefits of the contract, as for instance, enjoying the property of another. 32.*

   a. *But if a county actually pays over the money on an illegal contract, which contract, however, the county had power to*

make had it followed the proper procedure; and if the county has actually enjoyed the benefits of the contract—then, it can not recover back the money. 33.

b. The converse of the doctrine that the city is not estopped from setting up the invalidity of a contract because required procedure in making a contract is not followed even though it was actually within its legal powers, is that the city can not, as plaintiff, compel one who has contracted with it, by an invalid contract to keep his contract though the city was so acting within its legal powers. 36.

c. And so, too, it would follow that if money has been paid to the city under such an invalid contract and this money has been regularly appropriated by the city to its uses, no consideration having been given therefor, the money can be recovered back, even though the city was acting within its powers. But unless the money has been so regularly appropriated by the city, in accordance with charter requirements, as to procedure—the city cannot be compelled to return the money. 36.

(1) The fact that a charter limits a city in incurring debts or liabilities above a certain amount, cannot be urged as a defense by the city to an action, no matter how great the amount sued for, for the return of money erroneously and by mistake acquired by the city. 49.

2. *The minority rule that if the city acts within its powers in making a contract—and enjoys the benefits—even though the proper procedure in making the contract is not followed—the city is estopped from denying the validity of the contract, is found in dicta in just one case.* 49.

3. *Of course, if the city acts entirely without its powers, in attempting to bind a party, the same rule would apply to exempt that party from any liability upon this attempted obligation.* 52.

4. *Agency Theory. If the legislative authority of a city authorizes a city official to contract for the city that official must act strictly within the scope of his agency, and cannot go beyond that in binding the city.* 54.

CHAPTER III.

THE THIRD STANDPOINT FROM WHICH WE MAY VIEW OUR SUBJECT, AND THE MOST GENERALLY DISCUSSED PHASE, IS THE APPLICATION OF THE RULE THAT WHEN CITIES ATTEMPT TO MAKE CONTRACTS "THE MODE IS THE MEASURE OF THE POWER." 55.

A. *When a charter or statute prescribes a mode of a city's entering into a contract, this mode constitutes the measure of the power, and this power of a municipal corporation is measured strictly by its charter. The same strict rule is followed if the law specifies the manner in which contractual obligations shall be liquidated, and persons dealing with a municipal corporation must take notice of these limitations.* 55.

1. *Distinction between English and American municipal corporations. The former, depending upon prescription for their existence and capacity, are not nearly so strictly limited in their governmental powers as are the latter which depend upon their charters. And so English citations are not of much value to us. 72.*

2. *Distinction between governmental and private capacity of city. There is a distinction drawn in the cases between a city acting in its governmental capacity purely and simply, and in its private capacity from which we may possibly infer that the same strict observance of charter requirements is not necessary in the latter as in the former case. 72.*

   a. *But if the Legislature imposes a restriction on the sale of city property, making it necessary for an ordinance to pass, for such a sale—then whether we regard this exercise of power as governmental, or private—the procedure laid down must be strictly followed. 76.*

3. *A mere failure to perform the clerical authentication of a contract as provided by charter, will not invalidate the contract, when another section of the charter specifying the essentials of a contract does not require such authentication. 76.*

4. *The provision of a charter that the common council should not create any debts beyond a certain amount is merely directory. 77.*

5. *The provisions of a statute requiring plans and specifications to be drawn before a contract can be let for a public building, and requiring letting*

to the lowest bidder, do not apply to the furnishings thereof. 77.

6. *How to plead the failure to exercise powers by the proper mode. The defense by a city to a suit for damages for the prevention of the performance of a contract with the city, that the contract was not signed by the mayor, as required by the charter, may be raised by demurrer—if the complaint does not set forth that the contract was so signed. Such formal charter requirements in the drafting of contracts must be affirmatively shown to have been complied with. 80.*

   a. *But a defense by the city that a contract could be made only under certain circumstances other than formal charter requirements—and that these circumstances not existing, the contract was beyond the power of the city —and so void, cannot be raised by demurrer where the complaint does not affirmatively show that such circumstances do not exist. It must be shown by answer. But if the contract is one entirely beyond the scope of the powers of the municipality, this defense may be made by demurrer. 80.*

7. *"Public conscience" and the right of legislature to compel city to pay illegal claims. The rule was laid down in some early California cases that even though a city was not legally liable for a claim against it, that if, in good conscience, it should pay the same, the state legislature might order that the city so pay. But later constitutional provisions have changed this rule. 81.*

CHAPTER IV.

THE FOURTH GENERAL WAY IN WHICH OUR SUBJECT IS TREATED IS BY CONSIDERING THE POWER TO SUBSEQUENTLY RATIFY PRIOR UNWARRANTED ACTIONS OF MUNICIPAL BODIES AND THEIR OFFICERS, AND, IF THERE BE SUCH POWER, WHAT AMOUNTS TO SUCH A RATIFICATION. 85.

A. *Ratification of actions done entirely without the powers of a city. Contracts made by a city or by city officials absolutely without its or their powers cannot in any way be subsequently ratified.* 85.

B. *Ratification of acts done within the powers of the city but not following the proper procedure.* 88.

1. *The ratification itself must follow the proper procedure which should have been in the first place followed in the act which is to be ratified.*

If the contract is made by the city or its officials within its or their powers, it cannot be ratified afterwards unless it is possible for the ratification to follow the same mode required to make the original act itself valid and the ratification can be made only by one who originally had power to contract. "Where the authority can originally be conferred only in a particular form or mode, the ratification must follow the same form or mode." (McCracken v. City of S. F., 16 Cal. at 623). But subject *to this qualification the contract may be ratified. Some of the cases therefore point out the distinction between the power of ratification in a municipality bound to follow a certain definite procedure laid down in a charter, and in a private individual or*

state government with no such restriction on his or its actions. 88.

a. Doctrine of mutuality in ratification. For a party to profit by ratification he must be a party to the act of ratification. 91.

2. There is some loose language in the early cases to the effect that if the act of the city is within its power, but wrongly exercised, it may be subsequently ratified by acts in pais—i. e., the doctrine of equitable estoppel may be invoked. But the better doctrine is the above described rule of the ratification strictly following the proper procedure. 91.

Municipal Liability on Contracts in California

CHAPTER I.

LIABILITY OF MUNICIPAL CORPORATIONS ON IMPLIED CONTRACTS.

A: THE RULE IS SOMETIMES STATED, THAT IF A CITY ACTS WITHOUT ITS POWERS IN MAKING A CONTRACT AND THE CONTRACTOR DOES THE WORK UNDER THE CONTRACT FOR THE CITY, THE CITY IS LIABLE AS ON AN IMPLIED CONTRACT. HOWEVER, IT IS ALSO STATED IN THE SAME CASES, THAT THE CITY IS NOT LIABLE AS ON AN IMPLIED CONTRACT, UNLESS THE BENEFITS CONFERRED ARE GENERAL, RATHER THAN LOCAL IN THEIR NATURE, OR UNLESS MONEY, OR PROPERTY IS RECEIVED BY THE CITY, WHICH DOES NOT BELONG TO IT: THE RULE BEING THUS RESTRICTED WHEN ATTEMPT IS MADE TO HOLD *A MUNICIPAL CORPORATION,* AS DISTINGUISHED FROM A PRIVATE CORPORATION, ON AN *IMPLIED CONTRACT.*

The first important expression of opinion on this question was contained in dicta of Justice Cope in *Argenti* vs. *City of San Francisco,* 16 Cal. 255, and this dicta not necessary to the decision in that case, started an erroneous trend of reasoning by courts and counsel, which not even the subsequent withdrawal of these sentiments, by Justice Cope himself, in *Zottman* vs. *San Francisco,* 20 Cal. 96, could stop.

The *Argenti* case was an action to recover a sum of money alleged to be due the plaintiff for grading and planking streets in San Francisco. The questions were:

1st. Did the City have power under its Charter to make the contract with plaintiff? It was ruled that it had, pages 262, 263, 264.

2nd. Supposing that the City acted without its powers by contracting a bigger debt than the charter allowed; was it liable as on an implied contract, because of benefits received? Justice Cope by way of dictum in the principal opinion said that it was.

At pages 264-265, he says:

"It is well settled in relation to the contracts of corporations, that where the question is one of capacity or authority to contract, arising either on a question of regularity of organization, or of power conferred by the charter, a party who has had the benefit of the contract cannot be permitted, in an action founded upon it, to question its validity."

And at page 273:

"From this examination of the authorities, it is evident that the doctrine contended for by the counsel for the city cannot be maintained. The theory is, that a municipal corporation can only be bound by a contract to which it has expressly assented, and that such a corporation is exempt from the operation of the rules which relate to and govern the contracts and liabilities of individuals. We readily admit that the powers of a corporation are derived solely from the act creating it; and that, as a general rule, these powers must be exercised in the particular mode pointed out by the charter. It does not follow, however, that even a want of authority is, in all cases, a sufficient test of the exemption of a corporation from liability in matters of contract. Of course, an executory contract, made without authority, cannot be enforced; but a different question arises where the contract has been executed, and the corporation has received the benefit of it. In such a case, the law interposes an estoppel, and will not permit the validity of the contract to be called in question."

It was ruled by Chief Justice Field, in dicta in the concurring opinion that as to this point, the City would not be liable on an implied contract, because that rule does not apply to municipal corporations, except when the benefits conferred are *general*, and not *local*, in their nature; or where money, or property, is received by the City, which does not belong to it; and that the benefits of street improvements in this case were of a local character, assessed to the property owners immediately benefited, etc. Chief Justice Field says, pages 282-284:

"But I place my concurrence in the judgment heretofore rendered in this case upon the validity of the contracts with the city, which were completed by the acceptance of the proposals of the contractors, and the primary liability of the city for the

work performed thereunder. I have been thus explicit, because I do not consider that, independent of such contracts, any liability would attach to the city for the improvement of the streets. A municipal corporation can only act in the cases and in the mode prescribed by its charter, and for street improvements of a *local* nature, express contracts, authorized by ordinance, are necessary to create a liability. The doctrine of liability, as upon implied contracts, has no application to cases of this character. That doctrine applies to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it—not from any contract entered into by her on the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it; or if used by her, to render an equivalent to the true owner, from the like general obligation. In these cases she does not, in fact, make any promise on the subject, but the law, which always intends justice, implies one; and her liability thus arising is said to be a liability upon an implied contract, and it is no answer to a claim resting upon a contract of this nature, to say that no ordinance has been passed on the subject, or that the liability of the city is void when it exceeds the limitation of $50,000 prescribed by the Charter. The obligation resting upon her is imposed by the general law, and is independent of any ordinance, and the restraining clauses of the charter. It would be, indeed, a reproach to the law, if the city could retain another's property because of the want of an ordinance, or withhold another's money because of her own excessive indebtedness.

"In reference to money, or other property, it is not difficult to determine, in any particular case, whether a liability with respect to the same has attached to the city. The money must have gone into her treasury, or been appropriated by her, and when it is property other than money, it must have been used by her, or be under her control. But in reference to services rendered the case is different. Their acceptance must be evidenced by ordinance to that effect. Their acceptance by the city, with the consequent obligation to pay for them, can not be asserted in any other way. If not originally authorized, no liability can attach upon any ground of implied contract. The acceptance, upon which alone the obligation to pay could arise, would be wanting.

"The improvements for which the claim is brought in the present case, were local in their character, and though, to some extent, of general benefit, yet were chiefly for the benefit and advantage of the immediate neighborhood. It is for this reason that assessments for such improvements are generally levied upon adjacent property. The advantages resulting from them do not constitute that kind of general advantage to the city, from the existence of which any liability to pay for the same can be inferred. The general rule, that when one takes a benefit which is the result of another's labor, he is bound to pay for the same, does not apply to cases of this kind. The benefit is immediately to the adjacent property holders, and only indirectly to the city at large.

"I admit that there are numerous authorities which conflict with these views. Indeed, upon the general subject of the extent of the liability of a municipal corporation, the authorities are a tangled web of contradictions, and it is difficult to assert any proposition with respect to the same for which adjudications on both sides may not be cited. As a general rule, undoubtedly, the city is only liable upon express contracts, authorized by ordinance. The exceptions relate to liabilities from the use of money, or other property, which does not belong to her, and to liabilities springing from neglect of duties imposed by the Charter, from which injuries to parties are produced. There are limitations even to these exceptions in many instances, as where the property or money is received in disregard of positive prohibitions; as for example, she would not be liable for moneys received upon the issuance of bills of credit, as this would be in effect to support a proceeding in direct contravention of the inhibition of the charter. Other limitations may exist, but it is not necessary to pursue the matter any further."

3rd. Granting that the City had the power to make this contract, was one actually made? (Pages 265 ff.) Pages 273-4 show Justice Cope's ruling that an express contract was made by an agent of the City, and that, though the evidence does not show that he was expressly authorized to make the contract, it does show that the City authorities knew the facts, and their silence amounts to a ratification, and an estoppel. The point of receiving benefits is here urged, too, to show such a ratification.

"It is shown by the evidence, that the improvements mentioned in the complaint were constructed for the exclusive benefit of the city and its inhabitants; that these improvements were of a valuable and permanent character, and were constructed in pursuance of certain contracts entered into with an officer of

the corporation, who executed the same in his official capacity; that, in making the improvements, reliance was placed upon the validity of these contracts, and the obligation of the City to pay as therein provided; that the improvements were made under the immediate supervision of an officer of the city government, and, when completed, were approved of and received by him on behalf of the City; that the authorities of the City were fully informed of these facts, and took no steps to repudiate the contracts, or enlighten the plaintiff as to the disposition of the City to pay for the improvements. Such other facts as are necessary to be noticed, will be referred to in connection with the subjects to which they relate.

"It is not disputed that the City received the benefit of the improvements for which the plaintiff seeks to recover; and so far as these improvements are concerned, the question is, whether there was any contract, express or implied, to pay. The fact that the improvements were constructed for the benefit of the City, is sufficient to raise the presumption of a contract; and it will not be contended that there is anything in the evidence to destroy the effect of this presumption. But, in our opinion, the plaintiff is entitled to recover upon the contracts under which the improvements were made. It is true, there is no evidence that the agent who signed these contracts on behalf of the City was *expressly* authorized to do so; but it sufficiently appears that the City authorities were cognizant of the facts, and their silence, under the circumstances, was equivalent to a direct sanction of the acts of the agent, and estops the city from denying his authority. It was well known that these contracts, involving, as was supposed, the liability of the City, were the only considerations inducing the construction of the improvements, and now that the improvements have been completed, and the City has received the benefit of them, it is too late to repudiate the contracts and avoid responsibility. It is unnecessary to enumerate the various acts of the city government in relation to these contracts. They were acquiesced in from the commencement to the completion of the improvements, and until the City had received all the benefits to be derived from their performance, their validity was never called in question. We think that upon no principle of law or equity can this be done now. It would be a fraud upon the plaintiff to permit it, and it is a proper case in which to invoke the protection of an estoppel."

Chief Justice Field, in his concurring opinion, as noted above, pages 282-84, decides as to this point exactly as he did with that

of the implied contract theory, that for the same reasons urged on that point no such ratification theory would hold under the facts of this case. Chief Justice Field bases his concurring opinion on the ground that there was, as a matter of fact, an express contract for the services rendered, and not the express contract found by Justice Cope, to-wit, the Act of the Street Commissioner who, unauthorized, executed the contract, which Justice Cope finds was subsequently ratified; but rather, the acts of the common council in calling for bids, and the receipt of bids, and the acceptance of same, etc., making an express contract requiring no ratification, and requiring no assistance on the theory of an implied contract because of benefits received. At pages 279-80, Chief Justice Field says:

"It will be thus seen that the charter vests in the Common Council the authority to order the improvements in question, and directs the mode in which the intention to make the same shall be indicated, the conditions upon which the work shall proceed, and the parties to whom the contract shall be awarded; and the general ordinance of November, 1852, designates the officer under whose supervision, on behalf of the City, the work shall be done. In the present case, the ordinance of July 21st, 1853, sufficiently indicates the intention of the Common Council to make the improvements; it states the work to be done, and the character of the grade; it calls for proposals and directs the award of the work; and the charter determines the party to whom the award shall be made. The ordinance was duly published, the advertisement duly made, the proposals received, and the work awarded. The contract was thus complete on both sides, and no protest having been interposed, it only remained to carry the same into execution. It is, therefore, of no moment, in my judgment, whether or not the Street Commissioner had authority to bind the City by the particular written instrument embraced in the record. The parties were mutually bound by the proceedings previously taken—the contractor in accordance with his bid and accompanying specifications, which were accepted—the city to pay him either directly, or to collect the amount by assessment upon the property, and transfer it to him. The drawing up of a formal contract, specifying its terms, is the usual proceeding upon the acceptance of a bid for a contemplated improvement; and, for many reasons, should be insisted upon, especially to avoid dispute as to the extent and details of the work. This can, however, only be a matter of moment, when it is attempted to enforce the contract against the contractor, or to hold him responsible for its imperfect ful-

fillment. It is of no consequence where there is no complaint on the part of the City as to the performance of the contract. In the present case, it is expressly found by the Court below, that the work was completed to the satisfaction of the Commissioners and of the City. The record does not disclose in what manner the satisfaction of the City was expressed, but it must be presumed, under the finding, to have been in a legal and authorized manner. I leave, therefore, out of consideration the instrument drawn up between the Street Commissioner and the contractor, and pass by the question whether the Commissioner had authority to execute it. This instrument does not purport to impose any additional duties upon the contractor beyond what devolved upon him from the acceptance of his proposals. It does, however, purport to bind the City for the payment of the work, and it is this feature which is the point of objection.

"The second ordinance, passed on the fifth of August, 1853, differs materially from the first ordinance. It does not call for proposals, or authorize the acceptance of any. It simply indicates the intention of the Common Council to make certain improvements. Further action was requisite on the part of the Common Council, to authorize the work designated. Such further action, it appears, was taken; for it is found by the Court below that proposals for the work were made to the City by Swain, and were *accepted by the City*. The record does not disclose the manner in which the acceptance was made, but the presumption follows, from the finding, that it was in a legal and authorized form. With their acceptance, the contract was complete, and to it the same observations are applicable which have been made in relation to the contract with Barton. The work was performed, and according to the finding of the Court, as we have already stated, in the very best manner, to the satisfaction of the Street Commissioner and of the City."

Justice Cope emphasizes the fact that his language as to implied contracts is dicta, by pointing out that the charter provision in question, which prohibited an indebtedness beyond a certain amount, was merely directory, and so, of course, it was not necessary to invoke the implied contract theory. Pages 263-4:

"It was provided by the charter that the Common Council should not create, nor permit to accrue, any debts or liabilities which, in the aggregate, with all former debts or liabilities, should exceed the sum of $50,000 over and above the annual revenue of the City, except in certain specified cases, and then

only in a particular manner. We regard this provision as directory to the Common Council, and not as a limitation upon the power of the City. It was too indefinite and uncertain to admit of any other construction."

Justice Cope, in the *Argenti* case, page 270, cites *Touchard* vs. *Touchard*, 5 Cal., 306, to the effect that "a municipal corporation in reference to all matters of contract, must be looked upon and treated as a private person, and its contracts construed in the same manner and with like effect as those of natural persons."

While that case does use language as above, it is loosely used—not necessary to the decision, which involved the effect of a condition subsequent in a deed of land.

Justice Cope cites, at page 273 of the *Argenti* case, *Seale* vs. *City of San Francisco*—which, at that time was up for rehearing in the Supreme Court. It was finally decided in 16 Cal., 284, on the lines of the Argenti case. No digest of the facts is given. In the *Argenti* case, page 276, it is shown by Chief Justice Field that at that time the case of *Seale* vs. *City of San Francisco* was up *for rehearing, not yet decided, and so no authority.*

Higgins vs. *San Diego Water Co.*, 118 Cal., 524, holds, 1st, that an express contract made by the City to lease a water supply system from a water company, and pay therefor money part of which money was intended as a subsidy for the building of a railroad by the lessor, is void, because the City under its Charter had no power to subsidize a railroad. Hence, the contract is "beyond the power of the City, and incapable of ratification directly or indirectly" (Page 555); and so no theory of estoppel could be brought into the case so far as the express contract is concerned. The acts relied upon as creating an estoppel were that the City required the Water Company to expend more than $100,000 in extending its plant for supplying water to consumers and refused to re-deliver possession of the plant when demanded.

2nd. That the contract was void for one and probably two additional reasons. To quote from the syllabus, pages 525-6:

"A resolution of a City Council authorizing the Mayor to execute a lease of a water plant, which has not previous to its passage been presented to the Auditor as required by the City Charter, and which lacked his required certificate that the contemplated indebtedness or liability could be incurred without

a violation of the restrictions imposed by the Charter, is fatally defective and void; nor had the water company the right to presume that the Council would not have authorized the Mayor to act, in violation of the Charter, without the proper certificate of the Auditor."

"Where the only authority conferred upon the Council by the Charter to adopt and carry out means for securing a supply of water for the use of the City and its inhabitants is found in the enumeration of matters as to which the Council is empowered to pass ordinances, which can not take effect without publication, an unpublished joint resolution authorizing the Mayor to lease a water plant is nugatory."

The last reason is not made decisive in the opinion of Beatty, Chief Justice, because he leaves open the question whether the Council could proceed by joint resolution instead of by ordinance, joint resolutions not requiring publication. (Page 552.)

3rd. That though the City could not be held liable on the express contract, for the reasons above stated, it could on an implied contract, for the "reasonable value of the use of the plant which it has actually enjoyed." (Page 555.)

This exception to the rule that municipal corporations are not liable on such implied contracts, is in line with the ruling of Chief Justice Field in the *Argenti* case, to-wit, that when property is received by the City which does not belong to it, the City is liable.

See discussion of this case in *Fountain* vs. *City of Sacramento,* 1 Cal. App. at page 467 (infra page 65).

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1. DISTINCTION BETWEEN EXPRESS AND IMPLIED CONTRACTS.

CITY CANNOT HOWEVER BE ESTOPPED FROM SETTING UP THE INVALIDITY OF AN *EXPRESS* CONTRACT, WHEN IT ACTS ENTIRELY WITHOUT ITS POWERS, EVEN THOUGH THERE MAY BE A RECOVERY AS ON AN IMPLIED CONTRACT.

Higgins vs. *San Diego Water Co.* (supra page 8, infra page 51, 118 Cal. at 554.

B. THE BETTER RULE IS THAT THE CITY CAN NOT BE LIABLE AS ON AN IMPLIED CONTRACT, WHEN ITS OFFICIALS IN CONTRACTING HAVE ACTED WITHOUT THEIR POWERS, EVEN THOUGH THE CITY HAS ENJOYED THE BENEFITS OF THE CONTRACT.

Zottman vs. *San Francisco,* 20 Cal. 96, at pages 105, 106, 107, 108 and 109.

Chief Justice Field gives the facts in his opinion as follows: (Page 98 ff.)

"In May, 1854, the City of San Francisco, then a municipal corporation, entered into a contract with Nutting and Zottman for the improvement of certain public grounds of the city known as Portsmouth Square, in accordance with certain plans and specifications, the work to be performed by the contractors under the supervision of a Superintendent to be selected by the Common Council of the City, and to be completed to the satisfaction of a Special Committee to be appointed by the Common Council, by the twelfth of September, following. A portion of the work designated in the contract consisted in the construction of an iron fence around the square. The contract was made in pursuance of an ordinance of the City, and no question is raised as to its validity. After it was made, the Special Committee and the Superintendent appointed by the Common Council, upon examination of the plans and specifications came to the conclusion that to render the work more durable than originally intended, there ought to be a stone base to the fence, instead of the one of wood named in the contract. They also discovered that no provision was made for painting the iron of the fence, without which, as stated by one of the witnesses, it would have immediately rusted from the damp weather of the season, and the fence have become of little value to the City, either for ornament or use. The Superintendent and Special Committee, under these circumstances, in presence of the City Attorney, the President of the Board of Aldermen, and of different members of the Board, ordered the contractors to perform the extra work mentioned—that is, to construct a stone base in place of the one of wood, and to paint the iron of the fence—and assured them that the City would pay them therefor. In conformity with this order the extra work was performed, the contractors furnishing the necessary materials. And the testimony in the case shows that during its progress all the members of the Common Council must have been aware of the order to the contractors, as the work was in full view from the windows of the Council chambers, and was the subject of general conversation and approval by the members at their various sessions and elsewhere, and no opposition to it was ever expressed by any member. * * * *

"It is not pretended that the Superintendent or Special Committee had any authority to enter into any contract on behalf of the City. Their powers were limited to the execu-

tion of the original contract, and did not embrace the making of a new or different one. But it is contended in substance: 1st, that as the employment of the contractors to perform the extra work which included the furnishing of the necessary materials, was known to the individual members of the Common Council, and was approved by them, an adoption and ratification of the employment by the corporation are to be presumed; and 2nd, that the corporation has received the benefit of the extra work of the contractors, and is in consequence liable to them upon an implied contract. * * * *

"1. An examination of the clauses of the charter of the city then in force, with reference to improvements and to contracts for work, will show the untenable character of the first position. The charter was the source of all the power which could be exercised on the subject. Looking to that instrument we find that it vested in the Common Council the legislative power of the city, and clothed them with exclusive authority over improvements of the city property, and prescribed the mode in which the authority should be exercised. It empowered the Council to pass 'all proper and necessary laws' for such improvements, (Art. 3, sec. 13) and it required 'every ordinance providing for any specific improvement' to be published after its passage by one board, and before its transmission to the other, with the ayes and noes, in some city paper, (Art. 3, sec. 4) and it declared that 'all contracts for work' should be let to the lowest bidder, after notice given through the public journals, (Art. 6, sec. 7). These provisions whilst conferring authority upon the Common Council, also fixed the bounds of their action. Beyond them they could not go, and give validity to their acts. They could, therefore, only provide for any specific improvement of the city property by the passage of a law—that is, an ordinance for that purpose. 'Laws' and 'Ordinances,' when applied to the acts of municipal corporations are synonymous terms, and were so used in the charter (Art. 3, sec. 3). And to apprise the public of the improvement contemplated, and thus give an opportunity to suggest objections to the same, and to prevent improvident legislation on the subject, the clause was inserted in the charter requiring the publication of the ordinance for the improvement, after its passage by one board before its consideration by the other Board. And even when the ordinance had become law, to prevent favoritism or fraud on the part of the Common Council or the officers of the city, the provision was added for giving the contract to the lowest bidder after due notice in the public journals. A contract made in disregard to these stringent but wise provisions cannot be the ground of any claim against the

city. Individual members of the Common Council were not invested by the charter with any power to improve the city property, and any directions given or contracts made by them upon the subject, had the same and no greater validity than like directions given and like contracts made by any other residents of the city assuming to act for the corporation. And if individual members could not thus make any valid contract originally, they could not by any subsequent approval or conduct impart validity to such contract. But we go further than this: The Common Council even could not by any subsequent action give validity to a contract thus made. The mode in which alone they could bind the corporation by a contract for the improvement of city property was prescribed by the charter, and no validity could be given by them to a contract made in any other manner. The rule is general and applies to the corporate authorities of all municipal bodies; where the mode in which their power on any given subject can be exercised is prescribed by their charter, the mode must be followed. The mode in such cases constitutes the measure of the power. Thus, where authority is conferred to sell property, with a clause that the sale shall be made at public auction, the mode prescribed is essential to the validity of the sale; indeed, there is no power to sell in any other way. Aside from the mode designated, there is a want of all power on the subject. This is too obvious to require argument, and so are all the adjudications. * * * *

"As a necessary consequence flowing from these views, a contract not made in the prescribed mode cannot be affirmed and ratified in disregard of that mode by any subsequent action of the corporate authorities, and a liability be thereby fastened upon the corporation. Ratification is equivalent to a previous authority; it operates upon the contract in the same manner as though the authority to make the contract has existed originally. The power to ratify, therefore, necessarily supposes the power to make the contract in the first instance; and the power to ratify in a given mode supposes the power to contract in the same way. Therefore, where the charter of a city authorizes the sale of city property only at public auction, a sale not thus made is from its very nature incapable of ratification, because it could not have been otherwise made originally. So where the charter authorizes a contract for work to be given only to the lowest bidder, after notice of the contemplated work in the public journals, a contract made in any other way—that is, given to any other person than such lowest bidder—cannot be subsequently affirmed. Were this not so the corporate authorities would be able to do retroactively what they are prohibited from doing originally. * * * *

"2. The second position of the appellant, that the corporation has received the benefit of the extra work of the contractors, and is in consequence liable to them upon an implied contract, is as untenable as his first position. Indeed, the argument which meets the first position shows the unsoundness of the second. If the Common Council could not by any subsequent action affirm and ratify a contract originally made in disregard of the requirements of the charter, so as to fasten a liability upon the corporation, it is difficult to perceive how the benefit, which may have resulted to the city in the improvement of her property from the performance of the unauthorized and illegal contract, could create any such liability. * * * *

"They could not, as we have already shown, from the restrictions imposed by the charter upon their powers, have made a valid contract in advance to pay the contractors the reasonable value of the extra work—the charter requiring all contracts for the improvement of the city property to be given out to the lowest bidder, and of course at a fixed price, after notice of the contemplated improvements in the public journals. What they thus had no authority to agree in advance to pay for the work they had no authority to agree to pay after the work was completed. * * * *

"The law never implies an obligation against its own restrictions and prohibitions, or as it is expressed in the New York case (*Brady* vs. *The Mayor etc. of New York,* 16 How. Pr. 432)—'the law never implies an obligation to do that which it forbids the party to agree to do.'

"To the application of the doctrine of liability upon an implied contract, where work is performed by one, the benefit of which is received by another, there must not only be no restrictions imposed by the law upon the party sought to be charged against making in direct terms a similar contract to that which is implied; but the party must also be in a situation where he is entirely free to elect whether he will or will not accept of the work, and where such election will or may influence the conduct of the other party with reference to the work itself. The *mere retention and use* of the benefit resulting from this work—where no such power or freedom of election exists, or where the election cannot influence the conduct of the other party with reference to the work performed, does not constitute such evidence of acceptance that the law will imply therefrom a promise of payment. Thus, if one person should erect a cottage or stable upon the land of another without request, the conduct of the architect could not be affected by a refusal of the owner of the land to accept the building. The architect could not, upon such

refusal, remove the building, it having become attached to and a part of the freehold; nor would the owner of the land be deemed to have accepted the building merely because he had not chosen to tear it down, or had seen fit to use it in connection with his land. From the necessity of the case, the owner receives the benefit of the building by reason of his right in the soil, and not from any supposed acceptance, without subjecting himself to any obligation of payment. So, too, in the present case, from necessity the corporation received the benefit of the stone base to the iron fence around Portsmouth Square, and of the painting of the iron fence, without incurring any liability therefor. It never ordered the work or the painting. These were done without its request or authority. A declaration by resolution that it did not accept of the same, could not of itself have affected the conduct of the contractors. They could not have interfered with either base or paint if such declaration had been made. Nor was the corporation bound to remove the base and paint to avoid liability. So, too, where work is done upon the streets of the city without authority—liability does not follow because the streets may be improved thereby, or their use, as previously, may be continued. Such continued use constitutes no such evidence of acceptance as to create a liability against the corporation."

Discussing his own separate opinion in the case of *Gas. Co.* vs. *S. F.*, 9 Cal. 453, Justice Field in the *Zottman* case, at page 108, says:

"The decision was placed upon the pleadings, and is not authority upon any question arising in the case at bar. One of the Justices did, it is true, discuss the case on its merits, and there are some expressions in his opinion which may be open to observation. The case on its merits was, indeed, a very strong one, and the decision might perhaps be supported upon the ground that the property of the plaintiff was appropriated to the necessary purposes of the city. It is unnecessary, however, to express any opinion upon this point, as the case itself is authority only upon a question of pleading."

(See *infra,* pages 29-31, for the case of *Gas Co.* vs. *S. F.*)

Discussing the *Argenti* case Justice Field says, page 108:

"The Justices who pronounced the judgment concurred only in the conclusion. They differed entirely in the grounds upon which they rested the liability of the city; one of them holding that a municipal corporation could only act in the cases and in the mode prescribed by its charter, and that for street improvements of a local nature express contracts authorized by ordinance were necessary to create a liability; and that the doctrine

of liability, as upon implied contracts, had no application to cases of that character. (16 Cal. 282.) It is sufficient, however, to observe that, in consequence of the disagreement of the Justices in their views, the decision is not authority upon any question presented in the present case."

Justice Cope in his separate opinion in the *Zottman* case, reverses his ruling in the *Argenti* case as follows:

"I am of the opinion, notwithstanding the position taken by me in *Argenti* vs. *The City of San Francisco*, that the views expressed by the Chief Justice upon the questions involved in this case are correct. The ground assumed in the case of *Argenti* was not essential to the determination of that case, and upon further reflection, I am convinced of the error of the reasoning upon which my conclusions were arrived at. The error arose from paying too little attention to the restrictive provisions of the charter; and I am satisfied that under these provisions no obligation was imposed upon the city by the transactions in question in this suit. The mode of contracting was prescribed by the charter, and the provisions upon the subject were of such a character as to operate necessarily as a limitation upon the power of the city to contract in any other form. The fact that the city had received a benefit is not sufficient to create a liability on her part; for no responsibility can result as a matter of implication where the law itself negatives the idea of its existence. It seems to be settled that where a charter of incorporation prescribes the mode in which the contracts of the corporation are to be made, such mode must be strictly pursued or the corporation will not be bound. Individual members of a corporation have no authority to bind the corporate body, nor can a corporate engagement be implied from conduct or declarations unauthorized by the corporation, or inconsistent with the charter. Corporations cannot be bound except by corporate acts, and it is only from such acts, done either by the corporation as a body or by its authorized agents, that any implication can be made, binding it in law; and no act contravening the provisions of the charter can be considered valid as a corporate act.

"There is no doubt of the application of this doctrine, and in the absence of a contract deriving its validity from the charter, the conclusion that the city is not liable appears to me to be irresistible. The rule that corporations must act in the prescribed mode, applies with peculiar force to a corporation organized for a public purpose.

"I concur in the views and conclusions of the Chief Justice."

The *Zottman* case thus stands for the following rules:

First:—When the Charter prescribes a mode of entering into a contract this mode must be followed, to hold the city liable.

Second:—One who had no power in the first place to make a contract cannot ratify a contract not made in accordance with the requirements of the Charter. The power of ratification presupposes the power of originally making the contract.

Third:—If a contract is not made according to Charter requirements no amount of ratification can make valid that contract. Being bad in its inception, it is not capable of being given any force or effect. And it makes no difference whether the attempted ratification be by individual members of the Common Council who would in no event have any authority to make a contract in the first place, or, by the Common Council as a whole, who could have, had they followed the Charter provisions in the first place, bound the City. "Were this not so the corporate authorities would be able to do retroactively what they are prohibited from doing originally" (page 103). "The power to ratify in a particular way implies the power to have made the contract in that manner" (page 105, quoting from *Brady* vs. *The Mayor etc. of N. Y.*, 16 How. Pr. 432).

Fourth:—*The law will not imply a contract against a city when the charter states how the contract must be made. That is, the Charter requires an express contract, made in a certain way. The law will not imply an agreement against its own terms and conditions even though the City has reaped benefits. As said in the New York case, "The law never implies an obligation to do that which it forbids the party to agree to do."*

Fifth:—The doctrine of charging one for benefits received, on an implied contract never applies unless the one receiving the benefits had a power of freedom to elect whether he would retain such benefits; which election would influence the conduct of the other party.

See dicta of Justice Henshaw in *Berka* vs. *Woodward*, 125 Cal. 119 (infra, pages 86-7);

Fountain vs. *City of Sacramento*, 1 Cal. App. 461 (infra, pages 63-6);

Brady vs. *the Mayor of N. Y.*, 16 How. Pr. (N. Y.) 432 at pages 445-6-7 (infra, pages 66-70).

1. DOCTRINE OF POWER OF ELECTION.

ONE CANNOT BE CHARGED WITH BENEFITS RECEIVED, ON AN IMPLIED CONTRACT, UNLESS HE HAS A POWER OF FREEDOM TO ELECT WHETHER HE WILL RETAIN THE BENEFITS, WHICH ELECTION WILL INFLUENCE THE CONDUCT OF THE OTHER PARTY.

The Charter of Los Angeles provided "that the City of Los Angeles shall not be bound by any contract, or in anyway liable thereon, unless the same is made in writing, by order of the council," etc.

A contract with the city for constructing a sewer provided that no extras were to be allowed except by consent and agreement by the city, or if the city and the contractor were unable to agree, then the City Engineer shall fix valuation and endorse it upon the contract. On the request of the City Engineer, steel bands were used for the pipe, which constituted a change in the contract. The contract did not give the City Engineer authority to act for the city in making the agreement. No endorsement on the contract was made by the Engineer, and the City never agreed to the same. Held that City was not liable for the extras.

J. M. Griffith Co. vs. *City of Los Angeles* (Cal.), 54 Pac. 383.

At page 385 the Court says:

"The course pursued by the engineer and the contractors, however just may have been their intentions in fact, ignored any right of the city to determine either the extent or the price of changes in the work then under contract. If it could be effectual to charge the city against its will for the additional bands, then it is not perceived that the contract afforded any protection whatever to the city against the indefinite expansion both of the plan and the cost of the sewer at the pleasure of the engineer and the contractors. In our opinion the terms of the contract do not support plaintiff's claim for the value of said bands."

On the point of *quantum meruit* the Court rules first that the City having no option to elect whether it would or would not accept the extra work, *quantum meruit* would not lie; and second—that because of the Charter requirements the city would not be liable.

Page 385: "Nor is the city impliedly liable as upon a *quantum meruit.* It never had opportunity to elect whether it would or would not accept the sewer with the double bands, if that

circumstance be material. When the contractors demanded payment for the bands, they had already received far the greater part of the contract price, and the sewer was imbedded below the surface of the earth, in the right of way provided by the city for its reception. Moreover, as we understand the charter of the city (Section 207, above referred to), no liability of that amount can be incurred by the city except in virtue of its written contract."

See *Zottman* vs. *San Francisco* (supra, pages 12-14), 20 Cal. at pages 106-7.

2. AND THE CONVERSE OF THIS LOGICALLY FOLLOWS—TO WIT, THAT A CITY CANNOT ESCAPE LIABILITY AS ON AN IMPLIED CONTRACT WHEN THE PERSON GIVING VALUE TO THE CITY HAS NO POWER OF ELECTION BUT IS COMPELLED BY LAW TO FURNISH SERVICES TO THE CITY.

See *Capital Gas. Co.* vs. *Young,* 109 Cal. 140 (infra pages 18-19).

3. IF BY CONTRACT WITH CITY, PARTY AGREES THAT HE WILL NOT HOLD THE CITY LIABLE HE CANNOT HOLD THE CITY ON THE THEORY OF BENEFITS ENJOYED, EVEN THOUGH HE IS BARRED FROM OTHER RECOVERY, FOR HIS WORK DONE.

Where a contractor for street improvements is to be paid by assessment of benefits, and he agrees to exempt the city from any liability under his contract, he cannot recover of such city for the improvements, on the ground that no legal assesments can be made to pay him therefor.

Connolly vs. *City and County of S. F.* (Cal.), 33 Pac. 1109.

4. BUT WHERE THERE ARE NO FORMAL REQUISITES FOR THE MAKING OF A CONTRACT WITH THE CITY AND NO QUESTION OF CITY'S EXCEEDING ITS POWER IS INVOLVED, A RECOVERY MAY BE HAD AGAINST THE CITY ON AN IMPLIED CONTRACT.

Capital Gas Co. vs. *Young*, 109 Cal. 140.

The syllabus reads:

"Under section 629 of the Civil Code, a gas company, engaged in the business of furnishing gas to consumers generally, for profit, in the City of Sacramento, is bound to furnish it to the

city upon demand; and having furnished it, the city is liable for the reasonable value thereof, although the Mayor of the City is a stockholder in and president of the Gas Company, and section 211 of the city charter inhibits its officers from being interested in any contracts or sales to the city involving the payment of money from its treasury."

At pages 143-4 the Court says:

"1. The authority to transact the business of the municipal corporation of the city of Sacramento, to procure supplies therefor, and to audit and allow claims against the city, is vested in the board of trustees, and B. U. Steinman, as mayor of the city, has not, so far as appears from the record, any authority in the premises.

"2. The gas furnished to the city was not supplied under or pursuant to any express contract with the respondent corporation of which Steinman is president, and the right to recover the reasonable value thereof is based upon the implied promise which the law raises.

"3. Under section 629 of the Civil Code the respondent was bound, upon proper demand, to furnish gas to the city, and upon refusal so to do, was liable to a penalty of fifty dollars as liquidated damages, and five dollars a day as liquidated damages for each day such refusal or neglect continues thereafter.

"Under the operation of this law the Gas Company was not a free agent with power to contract or refuse to do so, but it became its duty, upon demand, to furnish gas to the city, irrespective of the status of its president.

"The duty to furnish gas to the city devolved upon the respondent, not by virtue of any contract, but by operation of law, and hence the laws governing ordinary contracts resting in the volition of the parties thereto has no application."

Colusa County vs. *Glenn County,* 117 Cal. 434.

The County of Glenn, without right, received a portion of taxes paid itno the State treasury, which belonged to the County of Colusa.

Following the Argenti case, the Court held that an action for money had and received upon its implied promise to pay the same to the County of Colusa, lay against the County of Glenn. That is, Justice Field's ruling in the *Argenti* case that if money is received by a City that doesn't belong to it, it is bound to return it, is followed.

The Court says, pages 438-9:

"In *Argenti* vs. *San Francisco,* 16 Cal. 255, it was held that

if the city obtained the money by mistake, or without authority of law, it is her duty to refund it, not from any contract entered into by her upon the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial, and that in these cases the city does not make any promise, but the law implies one. (See, also, *Grogan* vs. *San Francisco,* 18 Cal. 590.) The County of Glenn having received the money in question without any right, and not being entitled thereto, is liable, in an action for money had and received upon its implied promise, to pay the same to the county of Colusa, which was entitled thereto."

There is no question in this case, however, as there was suggested in the dicta of the *Argenti* case, of a contract being made without the powers of the city.

5. CHANGE OF CIRCUMSTANCES. A CONTRACT WITH A CITY ORIGINALLY VOID FOR WANT OF AUTHORITY IN THE CONTRACTING CITY OFFICIALS TO MAKE THE CONTRACT, MAY BECOME A VALID OBLIGATION UPON THE PART OF THE CITY, BY A CHANGE OF CIRCUMSTANCES. FOR INSTANCE, A CONTRACT WITH A CITY ATTORNEY BY WHICH THE CITY AGREES TO PAY EXTRA COMPENSATION FOR LEGAL SERVICES, IS VOID. BUT IF THE ATTORNEY AT THE CLOSE OF HIS TERM OF OFFICE CONTINUES TO RENDER SERVICES, THE CITY MAY BE HELD ON AN IMPLIED CONTRACT.

Buck vs. *City of Eureka,* 109 Cal. 504.

There was a contract between the City Attorney of Eureka and the City, by which the City engaged the City Attorney at an extra compensation to do some legal work. When his term was up, he continued to act under this contract.

Held, that he could not recover on the contract, for legal services, because it was void, giving him extra compensation. It was ruled, however, that he be given the privilege of amending his complaint and suing in *quantum meruit* for services performed after his term of office expired.

In accordance with this ruling, the plaintiff did so amend his complaint, and the action comes up on appeal for the second time in *Buck* vs. *City of Eureka,* 119 Cal. 44. Judgment was recovered on the implied contract.

The case came up a third time, 124 Cal. 61, and the plaintiff was allowed to recover on an implied contract for work done

after his term as City Attorney expired, although the original contract was void.

At page 66 the Court says:

"The cases cited by appellant (against right of recovery) arose either where no authority existed to enter into an express contract or to do any acts from which a contract might be implied, or they were cases where the mode was the measure of the power. But where, as here, the authority existed in the council to employ plaintiff after he ceased to be City Attorney, he may recover upon an implied contract for the value of his services. Nor is it necessary, as is contended by appellant, that the knowledge or assent of the council be evidenced by some formal corporate act, as by ordinance. Implied contracts, within the scope of the powers of the council, may be deduced by inference from authorized corporate acts, without either a vote, or deed, or writing."

CHAPTER II.

THE SECOND ANGLE FROM WHICH WE MAY TREAT THIS SUBJECT REQUIRES A DISCUSSION OF THE THEORY OF EQUITABLE ESTOPPEL.

A. WHEN THE CITY OR ITS OFFICIALS ACT ENTIRELY WITHOUT ITS OR THEIR POWERS.

1. THE PREVAILING RULE IS THAT IF THE CITY OR ITS OFFICERS ACT ENTIRELY WITHOUT ITS OR THEIR POWERS IN MAKING A CONTRACT THE CITY AND ITS OFFICERS ARE NOT ESTOPPED FROM DENYING THE VALIDITY OF THE CONTRACT, EVEN THOUGH THE CITY HAS ENJOYED THE BENEFITS OF THE CONTRACT, OR THE PROPERTY OF ANOTHER.

If a municipal charter states that no contracts can be entered into, binding the city for the payment of money unless there is money in the treasury of the city at the time to pay the same, after paying the expenses of the city government and all other demands legally due, the Mayor and common council of the city have no power to enter into a contract to pay an attorney for services to be rendered in proposed litigation, unless there is such money in the treasury as above described. Certain services had been rendered under the contract when the city officials notified plaintiff that they would not be liable on the contract, as it was void.

Wallace vs. *Mayor of San Jose*, 29 Cal. 180.

Quoting from the decision, page 186:

"Respecting corporations generally, the late Chancellor Kent said: 'The modern doctrine is to consider corporations as having such powers as are specifically granted by the Act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any other.' (2 *Kent's Com.* 298.) He speaks of the rule thus briefly stated as an obvious doctrine, which had been declared by the Supreme Court of the United States, and repeated in the decisions of the State Courts, and then says: 'As corporations are the mere creatures of law established for special purposes, and derive all their powers from the Acts creating them, it is per-

fectly just and proper that they should be obliged strictly to show their authority for the business they assume, and be confined in their operations to the mode and manner, and subject matter prescribed.' The reasons which are the foundation of this doctrine in respect to private corporations apply *a fortiori* when considering the powers of municipal corporations. In *Argenti* vs. *City of San Francisco*, 16 Cal. 282, the Court says: 'A municipal corporation can only act in the cases and in the mode prescribed by its charter,' and the same doctrine as to subject matter is inculcated in the case of *City of Oakland* vs. *Carpentier*, 13 Cal. 545.''

At pages 187-8,

''The Common Council, as we have seen had no power to create a debt upon the credit of the city, unless there was sufficient money on hand to meet the same, after paying the expenses of the government and all other demands legally due. Money sufficient to meet a debt to be so created, over and above enough to pay the expenses of the city government and all other demands legally due, was a condition precedent to the power of the Council to create a debt which should be binding on the city. It does not appear from the complaint or otherwise that there was money in the city treasury properly applicable to pay the debt for which it was intended by the contract the city was to become liable. * * * *

''The Common Council were the agents of the corporation, and their authority was special and their power distinctly circumscribed. The corporation could not become bound by the contract unless it was made by the Mayor and Council in the exercise of the power delegated by the Act of incorporation, and within its limits. In dealing with these officers the plaintiff was bound to know the extent of their power, and to see that the condition, on which alone it could arise and subsist, had existence. (*Blum* vs. *Robertson*, 24 Cal. 140; *Branham* vs. *Mayor, etc., of San Jose*, 24 Cal. 604; *Brady* vs. *Mayor etc., of New York*, 2 Bosw. 173; *Swift* vs. *City of Williamsburg*, 24 Barb. 427.) The fact that these officers assumed to make the contract and thus bind the corporation, did not create the presumption that they possessed the power which they attempted to exercise, for no officer can acquire power or jurisdiction by the mere assertion of it. (*McMinn* vs. *Wheland*, 27 Cal. 314; *People* vs. *Cassels*, 5 Hill, 168; *Harrington* vs. *The People*, 6 Barb. 610.)''

A statute prohibited extension of time for performance after the time named in a contract for street work, to be made after the said time had expired. Such unwarranted extensions were,

however, made, and the work done. It was ruled that the fact that these illegal extensions were made, by officials of the city could not bind the city, because they never had authority to make such extensions.

Raisch vs. *City etc. of San Francisco,* 80 Cal. 1.

At page 6—quoting from 2 *Herman on Estoppel and Res Adjudicata* 1365, "Where there is no power or authority vested by law in officers or agents, no void act of theirs can be cured by aid of the doctrine of estoppel."

A County Board of Supervisors issued bonds without authority of law. They were in form negotiable and were purchased for a valuable consideration before maturity, and in the ordinary course of business. Later the Board of Supervisors ordered that these bonds be redeemed and paid.

It was ruled that both of the above orders—that issuing the bonds, and that ordering their payment—were void, and that mandamus would not lie commanding the County Treasurer to pay these bonds. *Sutro* vs. *Pettit*, 74 Cal. 332. Referring to the question of estoppel and of the injury suffered by those who bought the bonds, Justice McFarland said, pages 336-7:

"Neither can the doctrine of estoppel, or of ratification, or of bona fide holding, be successfully invoked by respondents. Those doctrines can be invoked against municipal corporations —if at all—only in cases of informality, irregularity, etc., on the part of an authorized agent. (*Dillon on Municipal Corporations,* 3d ed., secs. 457, 463, 511-553, and cases cited.) 'Where there is a total want of authority to issue municipal bonds, there can be no bona fide holding of them.' (*Town of East Oakland* vs. *Skinner,* 94 U. S. 255.) It is clear—in this state at least—that the issuance of bonds is not within the scope of the general and ordinary powers of a board of supervisors, and that such bonds can be legally issued only by virtue of express authority of the legislature. (*Dillon on Municipal Corporations*, secs. 485, 507 and cases cited; *Lindon* vs. *Case*, 46 Cal. 172; *Wallace* vs. *Mayor of San Jose*, 29 Cal. 181; *El Dorado County* vs. *Davidson*, 30 Cal. 521; *Robinson* vs. *Supervisors of Sacramento*, 16 Cal. 208; *Foster* vs. *Coleman*, 10 Cal. 281; *People* vs. *Supervisors of Eldorado County*, 11 Cal. 170.) The bonds in question, therefore, were issued without any authority at all, and are wholly void. And the action of the board of May 4, 1885, ordering these bonds to be redeemed, was, of course, of no value. The character of one void act of public officers cannot be changed by a sec-

ond void act of the same officers, declaring the first act to be valid.

"It is quite possible that the respondents paid full par value for these bonds, and that they will lose their money. But 'those who contract with a municipal corporation are bound to know the extent of the power of its officers.' (*Wallace* vs. *Mayor of San Jose*, supra.) Respondents would have discovered the worthlessness of the bonds upon the slightest inquiry. At all events, hard cases cannot be allowed to make bad law. An over-issue of twenty thousand dollars would have been no less valid than the over issue of two thousand dollars; and any other rule would put the people of a county in the complete power of careless or unscrupulous public officers."

It was ruled in *Merriam* vs. *Barnum*, 116 Cal. 619, Justice Henshaw writing the decision, that mandamus will not lie to compel the County Auditor to draw a warrant for an illegal allowance by the Supervisors, of a claim for services rendered at their request by a special legal adviser of the board. Plaintiff served for a month as such special counsel, fulfilling the requirements of his agreement with the Board. There was no authority in law for his employment as special counsel. The case cites *County of Modoc* vs. *Spencer*, 103 Cal. 498, to the same point.

Weaver vs. *San Francisco*, 111 Cal. 319.

By Act of February 25th, 1878, page 111, Sec. 1, ("The one-twelfth Act") the Legislature made it unlawful for the Board of Supervisors "to contract for, or render payable in the present or future, in any one month, any demand or demands against the Treasury" in excess of one-twelfth of $80,000.

Section 2 declares: "All contracts, authorizations, allowances, payments and liabilities to pay, made or attempted to be made in violation of section 1 of this Act, shall be absolutely void, and shall never be the foundation or basis of a claim against the Treasury of said City and County."

The Board of Supervisors allowed and ordered paid demands in excess of $^1/_{12}$ of $80,000 on various accounts prior to a contract with plaintiff, for labor, plumbing, etc., for the Fire Department of the City. Hence the plaintiff had no right of action for this part of his work.

At pages 325-6 Harrison, Justice, says:

"Whoever deals with a municipality does so with notice of the limitation of its powers, and with notice also that he can receive compensation for his labor or materials only from the

revenues and income previously provided for the fiscal year during which his labor and materials are furnished; and with the knowledge, too, that all other persons dealing with the municipality have the same rights to compensation and are subject to the same limitations as he is. Even though at the time of making his contract there are funds in the treasury sufficient to meet the amount of his claim, he is charged with notice that these funds are liable to be paid out for municipal expenditures before his contract can mature into a claim against the city, and, if others whose claims have accrued subsequent to his are able to intercept these funds, he is in the same condition as any creditor who has dealt with one whose assets are exhausted before he presents his claim. He acquires no claim in the nature of a lien upon these funds for the amount of his demand, nor is there any legal obligation upon the municipality, any more than upon any other debtor, to pay the claims against it in the order in which they are incurred, unless they are presented in that order, and in such condition and with such formalities as entitled the claimant to immediate payment. In dealing with the municipality he must rely upon the integrity of its officers that they will not incur any liabilities during the year in excess of the income and revenues provided for that year and, as a prudent man, he will ascertain not only the amount of that income, but also the amount of the claims already existing, and of those that are likely to be incurred."

For enforcement of Section 18 of Art. II of the Constitution forbidding any county to incur any indebtedness exceeding in any year the income and revenue provided for in such year, see

McGowan vs. *Ford*, 107 Cal. 177.

Barry vs. *Goad*, 89 Cal. 215, decides that where by statute the Board of Education of San Francisco is empowered to employ "teachers"—that this power gives them no right to employ "inspecting teachers"—and that a taxpayer and resident may maintain an action to restrain the Board of Education from drawing any draft upon the school fund in favor of such "inspecting teachers" in compensation for services rendered and to be rendered by virtue of such appointment. The case went off on the point that the appointment was unauthorized by law. Nothing is said about "implied contract."

White vs. *Mitchell* (Cal. App. Dec., Vol. IX, No. 436, page 225, Sept. 4, 1909.), holds that mandamus will not lie to compel the president of the board of city trustees of the City of Wood-

land to issue a warrant for fifteen days' service for attendance as a member of the City Board of Equalization at five dollars per day, where an ordinance of such city provides that such work must be completed within the limit of two weeks.

Citing *Walton* vs. *McPhetridge,* 120 Cal. 443.

In *San Francisco Gas Light Co.* vs. *Dunn,* 62 Cal. 580, a contract made between the City and the Gas Company, for supply of gas, covered a period of five years, whereas a statute provided that "said Board of Supervisors shall not hereafter make any contract for any purpose binding said City for a longer period than two years." There was some question as to whether this statute had been repealed by a later one. The Court held without deciding this point, in dicta not necessary to the opinion, that if the statute had not been repealed, that, even though the gas was furnished the City could not pay for it if the claim were based on this invalid contract. But the claim was allowed on the ground that a resolution passed by the Board of Supervisors, authorizing the payment of the demand, was within the powers of the Board *not depending on the contract at all* but upon powers given the Board to pass such a resolution by sections 71 and 74 of the Consolidation Act.

See dicta in Justice McFarland's leading opinion,
Contra Costa Water Co. vs. *Breed,* 139 Cal. 432, at page 436. (Infra pages 49-52).
See *Fountain* vs. *City of Sacramento,* 1 Cal. 461 (infra pages 63-6).

a. THERE IS A DISTINCTION BETWEEN A MUNICIPAL AND A PRIVATE CORPORATION AS TO DOCTRINE OF ESTOPPEL, THE DISTINCTION BEING THAT THE FORMER IS "ORGANIZED FOR GOVERNMENTAL PURPOSES AND INVESTED WITH A PORTION OF THE AUTHORITY WHICH PROPERLY APPERTAINS TO THE SOVEREIGN POWER OF THE STATE, AND CAN EXERCISE ONLY SUCH POWERS AS ARE EXPRESSLY CONFERRED OR NECESSARILY IMPLIED," WHILE THE LATTER IS "ORGANIZED FOR THE PROFIT OF ITS MEMBERS AND ITS EXECUTED ACTS IN PURPORTED FURTHERANCE OF THAT OBJECT, UNLESS RESTRAINED BY ITS CHARTER, OR PROHIBITED BY POSITIVE LAW, WILL BE UPHELD." *Von Schmidt* vs. *Widber,* 105 Cal. at 157-8.

As to the point of the Argenti case that a party having the benefit of a contract can not question its validity, when sued upon, as being beyond his capacity or authority to contract, in *Pixley* vs. *W. R. R. R. Co.*, 33 Cal. at page 199, Shafter, Justice, in a special concurring opinion, states the rule as follows: "Some of them (the cases) hold municipal corporations to be within the principle." But this was not necessary as Justice Shafter expressly bases his concurring opinion upon the point that the corporation was a trading corporation and not a municiple corporation.

b. STREET ASSESSMENTS

THERE ARE STREET ASSESSMENT CASES WHICH IN THE PRINCIPAL CONTAINED ARE AKIN TO THOSE CASES HOLDING THAT THE CITY IS NOT ESTOPPED FROM DENYING THE VALIDITY OF A CONTRACT MADE ABSOLUTELY WITHOUT THE POWERS OF THE CITY.

THEY GENERALLY ARISE FROM AN ATTEMPT TO FORECLOSE THE LIEN OF A STREET ASSESSMENT FOR STREET WORK ACTUALLY DONE, WHEN THE ORIGINAL CONTRACT BETWEEN THE CITY AND THE STREET CONTRACTOR IS VOID.

Williams vs. *Bergin,* 129 Cal. 461, was an action to foreclose the lien of a street assessment for street work done.

It was held that a blank bid for the street work, omitting the name of the bidder, is void, and that no valid contract can be let thereon to the persons who presented the blank bid. The Supervisors had no jurisdiction to make a contract with one who was not a bidder.

Nicholson Pavement Co. vs. *Painter,* 35 Cal.. 699.

This was an action to recover a street assessment for laying down the Nicholson Pavement on Powell Street, in San Francisco. The law required a certain procedure in the matter of street improvements—such as publishing notice of intention—advertising for sealed proposals — opening same in public — awarding to lowest bidder, etc., etc.

The contract in this case was let to the plaintiffs, who had a patented article which others could not use, the bid called for being for their article. It was held, therefore, that this was defeating the object of the law in calling for bids, etc., and therefore, the action of the Board of Supervisors in letting this contract was void. So judgment was given for the defendant.

For strict enforcement of statutory requirements for street improvement contracts, in order to hold owner of property liable to contractor on a street assessment, see

Gray vs. *Richardson,* 124 Cal. 460;
Schwiesan vs. *Mahon,* 110 Cal. 543;
Manning vs. *Den,* 90 Cal. 612.
See *Daly* vs. *San Francisco,* 72 Cal. 154 (infra, page 56).

A Street Superintendent has no power to extend the time fixed in the contract for completion of street work, after the work was completed and after the time limited in the contract had expired.

Mahoney vs. *Braverman,* 54 Cal. at 571.
To the same effect is *Fanning* vs. *Schammel,* 68 Cal. 428 (citing *Beveridge* vs. *Livingston,* 54 Cal. 54; *Brady* vs. *King,* 53 Cal. 44; *People* vs. *McCome,* 57 Cal. 153.

In *Oakland Paving Co.* vs. *Hilton,* 69 Cal. 479, it was held by Justices McKinstrey and Sharpstein that an application for a writ of mandate to compel the defendant as the City Marshal to enter into a contract for street work, in accordance with a certain Act of the Legislature, must be denied if it does not appear from the affidavit of the petitioner that it had complied with the requirements of such Act.

2. THERE IS BUT LITTLE AUTHORITY FOR THE CONTRA RULE TO THE EFFECT THAT IF A CITY ACTUALLY ENJOYS THE PROPERTY AND LABOR OF A PERSON, CONTRACTING WITH IT, AND REAPS THE BENEFIT FROM SUCH USE, IT IS ESTOPPED FROM DENYING THAT THE AGENTS OF THE CITY WHO MADE THE CONTRACT HAD AUTHORITY TO SO CONTRACT. JUST AS IN THE ABOVE DISCUSSED RULE OF LIABILITY OF CITIES ON IMPLIED CONTRACTS, SO HERE, THIS RULE AGAINST THE CITY IS SELDOM INVOKED BY THE COURTS.

Gas. Co. vs. *San Francisco,* 9 Cal. 453.

Plaintiff sued for gas furnished the city, on an implied contract, i. e., on the theory that the city had accepted the gas, used it, reaped the benefit from the use, and must be estopped from denying that the agent of the City, in requesting that the gas be furnished had authority to so bind the City. Justice Field upheld these contentions in an opinion after a rehearing granted,

and the first ruling of the Court was reversed. The case went off on a question of pleading—i. e. upon the necessity of a specific denial by the City, as well as by any other corporation, to a verified complaint—holding such a specific denial necessary.

Pages 469, 70, 71, 72 and 73.

"Upon these facts the appellant asserts a right to recover against the defendant for the gas furnished. The respondent denies the right upon the sole ground that there was no evidence of any ordinance of the common council authorizing the furnishing of the gas. The proposition of the respondent is that a municipal corporation can incur no liabilities otherwise than by ordinance. The position, in its full extent, is not tenable. Under some circumstances, a municipal corporation may become liable by implication. The obligation to do justice rests equally upon it as upon an individual. It cannot avail itself of the property or labor of a party, and screen itself from responsibility under the plea that it never passed an ordinance on the subject. As against individuals, the law implies a promise to pay in such cases, and the implication extends equally against corporations. This is as well established by the authorities as any principle of law can be. * * * *

"The defendant has received the benefit of the plaintiff's labor and materials for over a year and a half, and it ill comports with fair dealing that it should now seek to exonerate itself from liability, and the law will fail to effect its true end, if the defence interposed can prevail. The position contended for by the respondent, it is believed, is asserted in this State for the first time. The reports in other States are full of adjudged cases where actions upon implied contracts have been sustained against municipal corporations. They have been argued by able and distinguished counsel, and decided by eminent Judges, and the distinction has never been made between the liability of a private corporation and a municipal corporation, under circumstances analagous to those presented in the case at bar. * * * *

"Cases *ad infinitum* might be cited showing a general recognition in the Courts of the several states of the doctrine that municipal corporations, like individuals, may, under some circumstances, be held upon implied contracts. A corporate act is not essential in all cases to fasten a liability, and if it were necessary the law would sometimes presume in order to uphold fair dealing and prevent gross injustice, the existence of such act, and estop the corporation from denying it.

"Where the contract is executory, the corporation cannot be held bound unless the contract is made in pursuance of the pro-

visions of its charter; but where the contract has been executed, and the corporation has enjoyed the benefit of the consideration, an implied *assumpsit* arises against it. It will be presumed, for the purposes of justice, that the authority exercised by the officers of the corporation was properly delegated to them, and that contracts made by them without authority, have been ratified. 'If officers of the corporation,' says Story J., in *Bank of U. S.* vs. *Dandridge* (12 Wheat. 70), 'openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. * * In short, we think that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions from acts done of what must have preceded them as matters of right, or matters of duty.'

"But not merely as I have stated will such presumption be indulged; the corporation, in order to prevent injustice, will be estopped from denying the authority of its agents. 'In general,' says Parsons in his work on Contracts, 'if a person, not duly authorized, make a contract on behalf of a corporation, and the corporation take and hold the benefit derived from such contract, it is estopped from denying the authority of the agent.' The doctrine applies equally to municipal as to private corporations."

Justice Field, in the later *Zottman* case, discusses his opinion in that case of *Gas Co.* vs. *San Francisco,* showing that it went off on a question of pleading and is not authority for anything further than that point—and also that it was an extreme case in which the City had profited by using the property of another.

(See supra, page 14.)

a. THERE IS A DISTINCTION BETWEEN ENJOYING ONE ISOLATED BENEFIT, AND A CONTINUOUS COURSE OF BENFITS OVER A LONG PERIOD OF TIME —THE DOCTRINE OF ESTOPPEL BEING DENIED IN THE FORMER AND SOMETIMES ALLOWED IN THE LATTER CASE.

Dictum of Justice McFarland, *Contra Costa Water Co.* vs. *Breed,* 139 Cal. 439-40.

(Infra, page 50.)

B. WHEN THE CITY OR ITS OFFICIALS ACT WITHIN THEIR POWERS IN MAKING AN INVALID CONTRACT.

1. THE PREVAILING RULE, AS IN THE CASE WHEN A CITY ACTS WITHOUT ITS POWERS IS THAT THE CITY IS NOT ESTOPPED FROM SETTING UP THE INVALIDITY OF THE CONTRACT, EVEN THOUGH IT WAS ACTING WITHIN ITS POWERS, AND EVEN THOUGH IT HAS ENJOYED THE BENEFITS OF THE CONTRACT, AS FOR INSTANCE, ENJOYING THE PROPERTY OF ANOTHER.

An agreement made by a City with a Gas Company for a supply of gas, which agreement is not made as required in the Charter, does not entitle the Gas Company to a writ of mandate to compel the Mayor of the City to sign a warrant for a claim for gas actually furnished.

Los Angeles Gas Co. vs. *Toberman*, 61 Cal. 201.

Quoting from the decision, pages 203-4:

"But the motion by which the terms of the agreement between the plaintiff and the Council were settled was not voted as prescribed by the Charter, nor was the agreement itself ordered to be reduced to writing, nor was a draft of it prepared and submitted to the Council for its approval and order for signature as required by the provisions of the Charter.

"* * * * the names of those who voted for and against their adoption were not entered upon the journal of the proceedings as required by the charter * * * *. The agreement was therefore not made according to the forms prescribed by the Charter of the City, and it is not binding upon the City. Whence it results that the plaintiff was not entitled to a writ of mandate, and the order and judgment appealed from must be reversed."

The amount of gas furnished does not appear, but it was probably one month's service, as the contract provided for monthly payments.

Murphy vs. *Napa County*, 20 Cal. 497. Cope, Justice, delivering the opinion follows the *Zottman* case. At pages 502-3, he says:

"The plaintiff sues to recover the sum of $2,059.50, for work done and materials furnished in repairing a bridge, and alleges that the work was done and the materials furnished at the

request of the Board of Supervisors. The twelfth section of the Act of 1860 concerning roads and highways in the counties of Humboldt, Napa and Siskiyou, empowers the Road Overseer to make contracts for purposes of this character; but provides that the building and repairing of bridges, when the estimated cost exceeds fifty dollars, shall be let by him at public auction, under the direction of the Board of Supervisors, to the lowest responsible bidder, after ten days' public notice, etc. The effect of this provision is to limit the power of contracting in such cases to the mode thus pointed out; and this limitation applies as well to the Board of Supervisors as to the Overseer, and a contract made in any other manner is not binding upon the county. (*Zottman* vs. *City and County of San Francisco*, 20 Cal. 66). The plaintiff proved a request by the Board, accompanied by a promise to pay, but neither proved nor attempted to prove a compliance with the statute in awarding the contract, and it is clear that the proof was not sufficient to recover upon."

Here we have a case where the work had been done and materials furnished—and no recovery allowed.

Beatty, Chief Justice, in his concurring opinion, *Contra Costa Water Co.* vs. *Breed*, 139 Cal., pages 445-6 (infra, pages 50-52).

a. BUT IF A COUNTY ACTUALLY PAYS OVER THE MONEY ON AN ILLEGAL CONTRACT, WHICH CONTRACT, HOWEVER, THE COUNTY HAD *POWER* TO MAKE HAD IT FOLLOWED THE PROPER PROCEDURE; AND IF THE COUNTY HAS ACTUALLY ENJOYED THE BENEFITS OF THE CONTRACT,—THEN, IT CANNOT RECOVER BACK THE MONEY.

In *Sacramento Co.* vs. *Southern Pacific Co.*, 127 Cal. 217, the County Board of Supervisors made a contract with a railroad co. for the construction of a bridge, the county to have certain privileges of use of the bridge by the public. The bridge was finished and before its completion a first payment made by the county. The bridge was used, as per the contract, by the public continuously since its completion. The county thereupon brought suit to recover the money paid on the ground that the contract was void because not entered into in accordance with statutes which required plans and specifications, notices, bidding, etc., as conditions precedent to the building of a bridge by a county. The Court does not pass on the legality of the contract,

but Justice Garoutte, in the prevailing opinion, holds that even though the contract was illegal, the county was estopped, after using the bridge and after the railroad had actually done work on the construction, from getting the money back.

At pages 222-3 and 4 Justice Garoutte says:

"If a municipality purchase a fire-engine, and possession is taken and purchase price paid, in an action by the municipality to recover the amount paid, by reason of invalidity in the contract, we imagine no Court would grant the relief—at least while the municipality retained possession of the engine. And this, too, notwithstanding the widest departure from the statute may have been practiced in the making of the contract. The case at bar in principle differs but little from the illustration given.

"There is nothing so sacred about a municipality that an estoppel may not be raised against it by its acts. In equity and good conscience, like individuals, it is bound to treat its neighbors fairly and justly. * * * *

"It is apparent that public corporations, like individuals, are bound to act in good faith and deal justly; that they can not be allowed to enter into contracts involving others in expensive engagements, silently permit these contracts to be executed, and then repudiate them because the statutory steps have not been pursued in the letting of the contracts."

Beatty, Chief Justice, wrote a strong dissenting opinion, in which he shows that the rule of the case can not be supported by the Argenti case as it never was the rule, even of that case, but that it was simply the opinion of Justice Cope, and later repudiated by Justice Cope himself in the *Zottman* case.

The Chief Justice's dissenting opinion is as follows:

"I dissent from the order denying a rehearing of this case because, in my opinion, the decision rests necessarily upon a doctrine destructive of essential safeguards of important public rights. The essence of the decision is that a contract, void for want of compliance with the conditions and limitations upon and under which alone boards of supervisors have power to bind their counties, acquires all the force and obligation of a valid contract if the contractor commences work and expends money in pursuance of its terms before he is notified that the county repudiates it. This doctrine sweeps away at once all limitations upon the power of the board, for it can readily be seen that the contractor must always have it in his power to commence work just as soon as he has induced the board to enter into a contract

in defiance of the regulations intended to govern their action; and it is also apparent that the board which desires to make contracts in disregard of the law will have the same motive to allow the commencement of the work that they have to enter into the illegal contract.

"And how can the equitable doctrine of estoppel apply in such a case against the public? The facts are all known to the contractor. There has been no misrepresentation, no concealment. He knows what the contract is and how it has been obtained. If it is illegal and void he knows it, and if he goes to work under it he does so with eyes open. In such case there can be no estoppel. The expression quoted in the Department opinion from *Argenti* vs. *San Francisco*, 16 Cal. 266, was never the law even of that case. It was but the opinion of a single judge, not concurred in by his associates and expressly repudiated by him in the later case of *Zottman* vs. *San Francisco*, 20 Cal. 109, 81 Am. Dec. 96, where he lays down the doctrine which this case sets aside. It is true that some decisions have been made in other jurisdictions which sustain the present ruling here, but it is certainly opposed to the views which have heretofore prevailed in this court, and to the weight of authority elsewhere.

"The judgment of the Superior Court should have been affirmed."

(See pages 225-6.)

It is to be noted of the above case—

1st—That the contract is not decided to be illegal, and

2nd—That if it was illegal it was not such a contract as it was without the power of the Board of Supervisors to make.

3rd—The money had been paid over by the City. See discussion of this case in *Fountain* vs. *City of Sacramento*, 1 Cal. App. 461, at page 466 (infra, pages 52-53).

This same case came before the Court, in another form, in an action filed in the same month as *Sacramento Co.* vs. *S. P. Co.* but decided some two years later. (*Croley* vs. *Cal. Pac. R. R. Co.*, 134 Cal. 557.) The plaintiff, as a tax payer, sued to enjoin the payment of the second installment of $15,000 to the R. R. Co., agreed to be paid upon the completion of the bridge, on the same grounds set out in the first case, and the Supreme Court held that the contract was a valid and legal contract; that the section of the county government act prescribing bidding, advertising, etc., for construction of bridges has no application to bridges constructed between two counties.

b. THE CONVERSE OF THE DOCTRINE THAT THE CITY IS NOT ESTOPPED FROM SETTING UP THE INVALIDITY OF A CONTRACT BECAUSE REQUIRED PROCEDURE IN MAKING A CONTRACT IS NOT FOLLOWED EVEN THOUGH IT WAS ACTUALLY WITHIN ITS LEGAL POWERS, IS THAT THE CITY CANNOT, AS PLAINTIFF, COMPEL ONE WHO HAS CONTRACTED WITH IT, BY AN INVALID CONTRACT TO KEEP HIS CONTRACT EVEN THOUGH THE CITY WAS SO ACTING WITHIN ITS LEGAL POWERS.

We have the point of liability on invalid contracts between a municipality and an individual, presented in this unusual form of the city suing the individual on such a contract executed by the city in a mode not allowed by the Charter, in *The City of San Francisco* vs. *Kelsy Hazen*, 5 Cal. 169, one of the several cases known as the "City Slip Cases." The Charter provided that no ordinance or resolution should be passed by the Common Council except by a majority of all the members elected. The number elected was eight. An ordinance was passed by a vote of 4 to 3, providing for the sale of certain "City Slip" property. The property was sold under this ordinance and the defendant was a purchaser. Action was brought by the City on two promissory notes given for this purchase.

Held that the City could not recover because the ordinance was void. Of course the real reason for denying the City the right to recover in such a case, is that no consideration has passed to the party contracting with the City.

c. AND SO, TOO, IT WOULD FOLLOW THAT IF MONEY HAS BEEN PAID TO THE CITY UNDER SUCH AN INVALID CONTRACT AND THIS MONEY HAS BEEN REGULARLY APPROPRIATED BY THE CITY TO ITS USES, NO CONSIDERATION HAVING BEEN GIVEN THEREFOR, THE MONEY CAN BE RECOVERED BACK, EVEN THOUGH THE CITY WAS ACTING WITHIN ITS POWERS. BUT UNLESS THE MONEY HAS BEEN SO REGULARLY APPROPRIATED BY THE CITY, *IN ACCORDANCE WITH CHARTER REQUIREMENTS, AS TO PROCEDURE*—THE CITY CANNOT BE COMPELLED TO RETURN THE MONEY.

The following "City Slip" cases sustain the above views.

McCracken vs. *City of San Francisco*, 16 Cal. 591.

The Charter of San Francisco provided that the Common

Council should "have power within the City to pass all proper and necessary laws for the regulation, improvement and sale of City property." An attempt was made to pass such a law providing that the Mayor and a Committee sell certain property (Ordinance No. 481), but it failed to receive a majority vote and so, failed of passage. But the Mayor and committee went ahead and acted on the theory that the Ordinance had passed, advertising, etc., and the property was sold. Immediately before the sale, another Ordinance was proposed in the City Council (No. 493)—and passed, referring to the funds to be derived from the sale under Ordinance No. 481, and appropriating these funds to certain purposes.

The sale was consummated, and the purchase price of the realty finally paid, when the purchaser sued the City for this money on the theory that he had never received title to this property as the sale was made without authority from the City.

On the other hand, it was contended by the City, first, that Ordinance No. 493 passed prior to the sale, recognized and adopted the proceedings taken in accordance with Ordinance No. 481: and, second, that the sale of the property was subsequently ratified by the City, by acts of the City after the sale, as, appropriating the proceeds of the sale, etc.

Justice Field rendered the opinion and ruled against the City on both propositions, overruling *Holland* vs. *San Francisco,* 7 Cal. 361, in which the precise question had arisen, calling for the determination of the effect of this same Ordinance No. 493 upon the same Ordinance No. 481.

The *McCracken* case holds:

1st:—That the Common Council could not go without the powers delegated to them, in the Charter, in selling real estate, whether we regard this power as political or governmental, or that of a mere private corporation.

2d:—That the Common Council could not by merely referring to an invalid Ordinance as if it were valid, breathe validity into it.

3rd:—That the Common Council did not subsequently "ratify" this sale,

First, because there was no formal act of ratification done in the same mode required for the original act itself—that is, by ordinance expressly ratifying.

Second, because the Council had no power to ratify, as the property would have to be sold at public auction, which immediately gives others than the purchaser plaintiff a right to buy. The suggestion is strongly made also—that since the property

had in the first place to be advertised, etc., this rendered ratification impossible.

Justice Field's language is so strong and his reasoning so clear, that we shall quote at length. Pages 619-626,

"The thirteenth section of the third article (of the charter) provided that the Common Council should 'have power within the city to pass all proper and necessary laws for the regulation, improvement and sale of city property; for the levy and collection of city taxes on all taxable property, not to exceed one per cent a year upon the assessed value; for the laying out, making, opening, widening, regulating and keeping in repair all streets, roads, bridges, fences, public places and grounds, wharves, docks, piers, slips, sewers, wells and alleys, and for making the assessments therefor; for regulating and collecting wharfage, dockage and cranage upon all water craft and all goods landed; for securing the protection, health, cleanliness, ornament, peace and good order of the city; for the prevention and extinguishment of fires,' etc.

"By this section the power to sell the city property was placed on the same footing with the power to levy taxes, grant licenses and to pass laws for the government of the city. By this section all the authority was conferred which could be exercised by the Common Council upon the subject. They were the mere agents of the corporation, and possessed only such powers as were specially delegated to them by the charter, and when that instrument granted a power with a specific designation as to the mode in which it should be used, the mode was restrictive—no other mode could be allowed. * * * *

"Ordinance 493 is not a law providing for the sale of any property; nor does it purport to be anything of the kind. It does not describe any property, or direct any sale, or confer authority upon any parties to sell. It assumes that an ordinance ordering the sale had already passed, and refers to it for the simple purpose of appropriating certain proceeds of the sale. This assumption imparted no vitality to the rejected ordinance, which was referred to as having passed. The Common Council could not in this way recall the rejection and give validity to the supposed ordinance. This would be in effect to pass an ordinance by referring to it as passed, or by admitting that it had passed. The Common Council could pass an ordinance only in one way, and that was by voting for it. To give validity to the sale, a law directing the same was requisite. Nothing less would answer under the charter. * * * *

"The distinction taken between the powers of a municipal corporation, when acting in its political and governmental character, and when acting with reference to its private property, has no application to the questions involved in the case at bar. Its powers, whether regarded as political or governmental, or those of a mere private corporation, could be exercised only in conformity with the provisions of the charter. The Legislature could impose such restrictions as it thought proper; and it saw proper to require the formalities of legislation for the disposition of the city property. * * * *

"The case of *Holland* vs. *The City of San Francisco* is cited as authority for the proposition that the proceedings of parties, assuming without authority to act on behalf of the city, may be adopted by a subsequent ordinance. In that case, a claim similar to that of the plaintiff was passed upon, and held invalid. The opinion was delivered by Mr. Justice Burnett, Mr. Justice Terry concurring, and Mr. Chief Justice Murray dissenting. In that case, the fact that the property had been previously dedicated to public use, as a public dock, was not presented. This fact distinguishes that case from the one at bar. Even upon the reasoning of Mr. Justice Burnett, it would hardly have been contended that the admission supposed to be contained in Ordinance 493 operated as a repeal of the public grant. But aside from this consideration, even were the facts in the two cases precisely similar, we should not follow the ruling of that case, for, in our judgment, it is manifestly erroneous—setting aside fundamental principles of the law of corporations, which, however much distorted or departed from, will constantly reassert themselves. Mr. Justice Burnett first holds that the City, under the provisions of the charter, can only make a valid sale of the city property by the passage of an ordinance authorizing the sale. In this view we agree with him. He further holds, however, that Ordinance 493 recognized and adopted Ordinance 481, so as to render the subsequent sale valid and binding upon all parties—that is to say, to be consistent with his first position, that Ordinance 493, by the fact that it recognizes the previous ordinance as having passed, and appropriates a portion of the anticipated proceeds of the sale, actually passed that previous ordinance, recalled its rejection, and made it as valid an ordinance as if it had originally received the vote required by the charter. If this be not the doctrine advanced by the learned Justice, we confess ourselves unable to understand the opinion. To this doctrine we never can yield our assent. It is unsound in principle and is unsupported by any authority, and could it be maintained, would break down and destroy all the checks

imposed by the Legislature upon the exercise of the powers of the Common Council. Upon this doctrine that body could at any time adopt the unauthorized acts of others, in the levy of taxes, in the sale of public property, in the opening of streets, in the infliction of penalties, and by admitting in one ordinance that it had previously passed an ordinance for those purposes, give validity to those acts. * * * *

"2. The alleged subsequent ratification of the sale is based upon the following acts and proceedings of the Common Council:

"First: Upon the Ordinance numbered 505 in the official book of ordinances of the city, passed on the tenth of January, 1854, by which the Mayor and Land Committee were authorized to pay out of moneys in their hands arising from the sale ordered by Ordinance 481, the salaries of the members and officers of the police, for the months of November and December of the previous year.

"Second: Upon joint resolutions passed in January, April and September, 1854, by which the sale was referred to, the proceeds were appropriated, and the Land Committee released from responsibility on account of promissory notes and warrants received as proceeds of the sale by their Secretary, and subjected to attachment in suits against the city whilst in his hands.

"Third: Upon the acceptance of the reports of the Land Committee and of the City Treasurer, in relation to the proceeds received from the sale.

"To determine the effect of these acts, as a ratification of the sale, it is necessary to consider the conditions essential to a valid ratification. To ratify, is to give validity to the act of another. A ratification is equivalent to a previous authority. It operates upon the act ratified in the same manner as though the authority had been originally given. It follows, as a consequence, that where the authority can originally be conferred only in a particular form or mode, the ratification must follow the same form or mode. Thus, if an authority to execute a deed of a private person must be under seal, the ratification of the deed must be also under seal; and where an authority to do any particular act on the part of a corporation can only be conferred by ordinance, a ratification of such act can only be by ordinance. * * * *

"It follows, also, from the general doctrine, that a ratification is equivalent to a previous authority, that a ratification can only be made when the principal possesses at the time the power to do the act ratified. He must be able, at the time, to make the contract to which by his ratification he gives validity. The ratifica-

tion is the first proceeding by which he becomes a party to the transaction, and he cannot acquire or confer the rights resulting from that transaction, unless in a position to enter directly upon a similar transaction himself. Thus, if an individual, pretending to be the agent of another, should enter into a contract for the sale of land of his assumed principal, it would be impossible for the latter to ratify the contract, if between its date and the attempted ratification he had himself disposed of the property. He could not defeat the intermediate sale made by himself, and impart validity to the sale made by the pretended agent, for his power over the property or to contract for its sale would be gone. So, also, contracts made upon an assumed agency for a single woman cannot be ratified by her after her marriage, without the consent of her husband, for her power to contract alone ceases with her marriage.

"If we apply these principles to the case at bar, the question of ratification will be one of easy solution. By the Charter the Common Council could authorize a sale of lands only by an ordinance passed for that purpose (art. 3, Sec. 4) and such sale could only be made at public auction (art. 6, sec. 6). The ordinance was required to be published in some newspaper of the city after its passage by one Board, before its consideration by the other Board. The object of this requisition was threefold: first, to guard against fraud on the part of the Common Council in the disposition of the city property; second, to apprise the public of the terms of sale, that every one might have an opportunity of purchasing, if he desired, in case the sale was ordered; and, third, to give an opportunity to the public to suggest objections to the sale or amendments to its terms.

"From this provision as to publication, the counsel of the appellant contends with great force that a sale of the city's lands, without an ordinance *previously* passed, was incapable of ratification, independent of any consideration of the mode required by public auction. It is unnecessary at this time to express any opinion on the proposition. It is clear that no ordinance ratifying the sale was ever passed. The joint resolutions, and the acceptance of the reports of the Mayor and the Land Committee and of the City Treasurer, in reference to the moneys received from the sale, may be laid out of consideration. The authority for the sale could originally have been granted only by ordinance,—and could not (only?) be ratified in the same manner—by ordinance. No ordinance referring to the sale was passed, except Ordinance No. 505. That ordinance is entitled 'An Ordinance to provide for the Payment of the Officers and Members of the Police.' By it the Mayor and Land Committee

were authorized to pay, out of the moneys in their hands arising from the proceeds of the sale ordered by Ordinance 481, the officers and members of the police, for the services rendered by them in the months of November and December of the previous year. Its only purpose was to dispose of certain proceeds of the sale. It contains no terms of ratification. It does not contemplate that any ratification was necessary. It assumes that Ordinance 481 was valid, and refers to it as the source of authority for the sale. It only appropriates certain moneys, and it is plain that the appropriation did not give validity to the mode by which the money was obtained. * * * *

"Again: the sale was required to be made at public auction. (Art. 6, sec. 6.) This mode was esential to the validity of any sale. A sale in any other mode would have been a nullity. A ratification of a sale of this character can only be made where the party ratifying possesses such right with reference to the property that he can sell absolutely at private sale. He may then ratify the sale without reference to its mode, whether made privately or publicly. But when this power in the sale of the property can only be exercised by public auction, he cannot ratify a previous sale. The object of the ratification is to vest in the previous purchaser the title; but at public auction there would be no necessity of this, for at the auction every one would be at liberty to bid, and the property would fall to the highest bidder. Apply this principle to the case, and it will be evident that a ratification by the Common Council of the unauthorized sale was impossible. The purchasers at that sale acquired no title; the object of the ratification is to give them one, and for that end the sale must be confirmed to them separately at the prices already offered,—that is, a sale must be made to them privately, which does not lie within the power of the Common Council. They can sell only at public auction, and this fact precludes the possibility of ratification by them of the previous sale."

Pimental vs. *City of San Francisco*, 21 Cal. 351, was an action for the return of moneys paid to the City for City Slip property, which property had been sold precisely as in the McCracken case, in accordance with the same city ordinance described in that case, which never really passed, the purchasers thus getting no title. It was held:

1st: That the subsequent passage of an ordinance within an hour previous to the sale, and which referred to the Ordinance directing the sale, and appropriated a portion of its anticipated proceeds, did not, by such reference and appropriation, recog-

nize and adopt the first ordinance, so as to render the subsequent sale valid and binding.

2nd: The subsequent appropriation, by ordinance, of the proceeds of the sale, did not act as a ratification of a sale which was never validly made in the first place.

3rd: The restraining clause of the Charter against incurring debts or liabilities above a certain amount, cannot be urged as a defense by the City to an action, no matter how great the amount sued for, for the return of money so erroneously and by mistake acquired by the City, as in this case.

Quoting from the decision of Field, Chief Justice, (pages 362-5),

"If the City obtain the money of another by mistake, or without authority of law, it is her duty to refund it, from this general obligation. If she obtain other property, which does not belong to her, it is her duty to restore it, or if used, to render an equivalent therefor, from the like obligation. (*Argenti* vs. *San Francisco*, 16 Cal. 282.) The legal liability springs from the moral duty to make restitution. And we do not appreciate the morality which denies in such cases any rights to the individual whose money or other property has been thus appropriated. The law countenances no such wretched ethics; its command always is to do justice. * * * *

"In some of the actions, the subsequent adoption of the ordinance directing the sale of the slip property has been alleged, as a defense, by the city. In *Holland* vs. *San Francisco*, this Court held—Justices Burnett and Terry rendering the decision, Chief Justice Murray dissenting—that an ordinance which was passed within an hour previous to the sale, and which referred to the ordinance directing the sale, and appropriated a portion of its anticipated proceeds, did, in fact, by such reference and appropriation, recognize and adopt the first ordinance, so as to render the subsequent sale valid and binding upon all parties. This decision was overruled in *McCracken* vs. *The City of San Francisco*, as it was too palpably unsound to stand the test of the slightest investigation. Indeed, we have never yet met with any lawyer who had the hardihood to attempt its justification. The reference in the second ordinance, independent of the appropriation it makes to the previous ordinance, did not add anything to the validity of that ordinance. There is no efficacy in the mere reference to previous legislation, whether valid or invalid. Nor did the appropriation designated in the second ordinance operate as an adoption of the previous ordinance. An ordinance cannot in this way be passed; it can only be passed in one way—by a

majority of both Boards of the Common Council voting for it. * * * *

"The subsequent ratification of the sale by the appropriation of its proceeds has also been alleged as a defense. But this appropriation did not operate, as we held in the *McCracken* case, as a ratification any more than the appropriation of moneys received from an illegal assessment would have operated to give validity to such assessment. * * * *

"In some of the actions against the city, the restraining clause of the charter of 1851 against the incurring of debts or liabilities exceeding in the aggregate, with former debts or liabilities, the sum of fifty thousand dollars, has been relied upon. This clause was the subject of extended consideration in the McCracken case, and we held that it referred to the acts or contracts of the city, and not to liabilities which the law casts upon her; that it was intended to restrain extravagant expenditures of the public moneys, and not to justify the detention of the property of her citizens, which she had obtained without authority of law. * * * *

"The several cases stand simply upon this ground: The city has obtained the money of her citizens without any consideration, under a mistaken impression of her rights, and has appropriated it to municipal purposes; and they insist, and so we have held, that she is, under these circumstances, bound, both legally and morally, to refund it to them."

"The several cases" above referred to were actions brought against the city for return of money paid for City Slip property.

Grogan vs. *San Francisco*, 18 Cal. 590, is another Slip case laying down the same principles on ratification as are found in *Pimental* vs. *City of San Francisco*.

The general question of the power of a city to, by subsequent action, ratify a previous unwarranted action—and the distinction between such a power in a municipality, bound to follow a certain definite procedure laid down in a charter, and a private individual, or a state government with no such restrictions on his or its actions, is well stated by Field, Chief Justice, pages 608-10. The original sale, under the Charter, had to be made at public auction. The subsequent attempted ratification was by ordinance of the Common Council.

"A ratification of an illegal public sale is in effect making a private one. The object of the ratification is to vest in the

purchaser the title, as he had acquired none previously, and for that purpose to confirm to him the sale at the prices already offered—that is, to make a sale upon the consideration of the original bid. At public auction this could not be done, for the very essence of an auction sale is that every one is at liberty to bid, and that the property shall fall to the highest bidder. It could only be done by a private arrangement, and as a consequence could not be done at all by the Common Council under the restrictions of the Charter. The case would be different if the Common Council had possessed authority to dispose of the municipal property at private sale. They could then have said: We will confirm the previous proceedings; we will take the money already advanced, and what is to be advanced, upon the bid, as a consideration, and transfer the title. But as the power of disposition could only be exercised in one way—by a direct ordinance authorizing a public sale, after due advertisement of the time, place and terms—no other mode could be adopted in its stead. Appropriation of the proceeds, proceedings upon the assumed validity of the sale, reference to the ordinance as having been passed would not answer the requirements of the Charter. The Common Council were not invested with any discretion to substitute a different mode for the disposition of the City's property in place of the one provided. A private proprietor, having full power over his own property, may ratify an unauthorized sale of the same made by a person assuming to be his agent, without reference to its mode, whether made publicly or privately; he may in some instances be estopped from denying the act of the assumed agent, after appropriating its benefits with knowledge of the facts. So the State may ratify the acts of her agents upon a subject within the constitutional control of the Legislature, when they exceed their powers. She may do this by legislation directly affirming the acts, or by legislation proceeding upon their assumed validity. The reason is obvious; there is no limitation as to the mode in which the State may give her assent, except that it must be by an act or resolution of her Legislature. Not so with a municipal body under restrictions such as controlled the action of the Common Council of the City of San Francisco. They could give their assent to the sale of the City's property only in one mode. It is unnecessary to refer to adjudged cases in support of these views. They are in accordance with the general current of all the authorities."

Satterlee vs. *San Francisco,* 23 Cal. 314, another City Slip case, affirms the *Grogan* case.

Herzo vs. *San Francisco,* 33 Cal. 134, adopted the reasoning set forth in *McCracken* vs. *San Francisco, Grogan* vs. *San Francisco, Pimental* vs. *San Francisco, and Satterlee* vs. *San Francisco* as to the liability of the City to return to purchasers of the City Slip lots, money actually paid to the City and appropriated by the City. But—for the first time, the Court takes up the question of the subsequent appropriation of the money which, in the McCracken, Grogan, and Pimental cases, was assumed as having been made. In this case Justice Rhodes, concludes that in fact, no such appropriation had ever been made because the ordinances attempting to appropriate this money were not passed in accordance with the Charter, and that therefore, since the agents of the City were not acting within the line of their authority when they deposited the money in the City Treasury, and since the City never, for the reasons stated, appropriated this money after it reached the City Treasury, that the City was not liable to return it; that the only persons liable were these agents, who thus, without authority, received this money.

Quoting from page 142:

"The receipt of the money by the Secretary of the Committee on Land Claims was not the act of the City, for he had no power to represent the City in that behalf. The proceedings of the Land Committee, and their Secretary in receiving the money paid as the purchase money, as well as the acts of the Treasurer in receiving the money from the Secretary and placing it in the treasury, were only the unauthorized acts of assumed agents, and did not of themselves bind the City. The purchaser could have recovered the money from the person who received it, or from any one into whose hands he was able to trace it; and it being shown that the money was paid to the Treasurer, as the purchase money for the lots, a demand upon and a refusal by him to return the money, would have rendered him liable to an action for its recovery. Upon the receipt of the money by the Treasurer, no liability attached to the City, for it was placed in the treasury without her direction or assent; and as she was not responsible for its being in the treasury, she would not be accountable for it to the purchaser until she had exercised dominion and control over it, treating it as her own."

Pages 143-5:

"A municipal corporation is the creature of the statute, invested with such power and capacity only as is conferred by the statute, or passes by necessary implication from the statutory grant. All powers outside those limits are as much beyond her

reach as if she had never been created. Her artificial existence is absolutely bounded and circumscribed by those limits. She has not all the powers of a natural person except as restricted by the statute, but she possesses none except such as are imparted to her by the charter of her existence. She may receive a conveyance of real estate, in trust, if so authorized by the charter, but without such authority the title would not pass to her. And so in relation to the receiving of money. The statutes authorize the corporation to levy and assess taxes, licenses, etc.; and she has power to receive money paid for those purposes, but she can not receive money paid as duties upon imports, because of the utter want of capacity. The Mayor and the Common Council and every officer of the municipality may have assisted in the receipt of the duties and in placing the money in the vaults of the City Treasury, and still it would be as void of effect as against the City as if she had never been organized under the charter.

"But it is insisted that if the incorporation can act upon the general subject to which the particular act belongs, this is enough; and although the particular act is forbidden, yet when done by her agents she is bound, because of her general jurisdiction over the subject. The proposition stated more narrowly, so as to be applicable to the case, is: That as the City has the general power to receive money, the receipt by her agents in her name, of money paid for any purpose, will bind her. But this proposition to be true must be more limited in its terms. The City has neither the general power to sell lands nor to receive money. She must have the capacity then and there to sell the land, or to receive the money for the purpose for which it is offered, or the acts of her agents will not bind her. This must be so, otherwise the restrictions and limitations imposed upon her by the Charter, and which constitute an essential part of her artificial being, are idle and meaningless. The City Treasurer, conceiving that it would be advantageous to the City to have the treasury replenished, might go through the form of selling the City Hall to one who was willing to loan the City his money, at the legal rate of interest, and upon the Treasurer's receipt of the money, the City would be liable for its repayment, with interest, because under the proposition as stated, she can act upon the general subject of the receipt of money.

"It is generally true that the acts of the officials of the City falling within the general scope of the authority conferred upon them, will bind the City, and she will be responsible for all the legitimate consequences of those acts. It is on this principle that several of the cases cited by the plaintiff depend. For ex-

ample: The City may levy a tax for municipal purposes, and it is the duty of the Assessor to make the assessment, and the Collector to collect the taxes. The Collector collects a tax from a person who is not liable to taxation for municipal purposes, and the City is answerable for the error, because the collection of municipal taxes falls within the general scope of the powers intrusted to the Collector. In the discharge of that duty, he is the agent of the City. Let the same officer assume the collection in the name of the City, of duties upon imports, and if it were enough to say, that he was authorized to collect the money for the City, she would be liable for the money so collected, though he was wholly unauthorized by law. But she is not responsible for his acts in that respect, because they are clearly without the general scope of his authority, as the Collector of taxes imposed for municipal purposes."

Pages 147-9:

"It is not intended to controvert the position of the plaintiff that if the City received the money of the plaintiff, she is liable in an action for its recovery, for it is correct beyond a doubt; but the important question in the case must first be decided: Did she receive the money? * * * *

"The third point is: 'The mode in which the City could render itself liable for the appropriation of the moneys being pointed out in the charter, not having been pursued, the City is not liable, for the mode is a part of the power.' This case differs from the preceding cases of the same class mainly in this particular. In the cases of *McCracken, Grogan, and Pimental* it was found that Ordinance No. 505, and Joint Resolutions No. 383 and No. 405, by which portions of the proceeds of the sale were appropriated, were legally passed by the legislative authority of the City; but in the present case the facts in relation to their passage are set out; by which it appears that each of them were passed by both Boards of the Common Council on the same day, and no one of them was, after its passage by one Board, and before being sent to the other, published in any city newspaper with the ayes and nays, or acted upon by the other on the same day by unanimous consent. (As required by the Charter.) * * * *

"What we have said upon the second point, going to show that the unauthorized receipt of the money by the city officials did not amount to a receipt of the money by the City, is equally applicable to this point, to prove that the unauthorized payment of the money by the Treasurer, did not constitute an appropriation of the money by the City. The fact that the

Treasurer may have paid portions or all of the money to creditors of the City, can make no difference in principle; for if he was not empowered and directed by the city authorities to make such payment—and the only mode in which she could act in conferring such authority, was through the medium of an ordinance appropriating the money—it would amount to no more than a voluntary payment made by any other person or by the same officer out of other funds, of which he may have procured possession, either rightfully or wrongfully, but without the direction, aid or consent of the city government or any of its authorities.''

(1.) THE FACT THAT A CHARTER LIMITS A CITY IN INCURRING DEBTS OR LIABILITIES ABOVE A CERTAIN AMOUNT, CAN NOT BE URGED AS A DEFENSE BY THE CITY TO AN ACTION, NO MATTER HOW GREAT THE AMOUNT SUED FOR, FOR THE RETURN OF MONEY ERRONEOUSLY AND BY A MISTAKE ACQUIRED BY THE CITY.

Pimental vs. *City of San Francisco,* 21 Cal. at 364.
(Supra pages 43-4.)

2. THE MINORITY RULE THAT IF THE CITY ACTS WITHIN ITS POWERS IN MAKING A CONTRACT—AND ENJOYS THE BENEFITS—EVEN THOUGH THE PROPER PROCEDURE IN MAKING THE CONTRACT IS NOT FOLLOWED—THE CITY IS ESTOPPED FROM DENYING THE VALIDITY OF THE CONTRACT, IS FOUND IN DICTA IN JUST ONE CASE.

Contra Costa Water Co. vs. *Breed,* 139 Cal. 432.

A water company sued the City for water supplied to the City. A city ordinance had fixed the rate, the Company had enjoined the execution of this ordinance—then the Company offered to accept even less than was fixed by the ordinance—and a resolution passed the City Council ordering the payment of this sum to the Company. The defendant Auditor refused to audit and draw his warrant for these claims and mandamus was instituted. Justice McFarland decided that:

1st: The Charter provisions for the drawing of contracts, making of bids, etc., for City supplies did not apply to the furnishing of water to the City.

2nd: By dictum—that though they did apply, and had not been complied with, the City could be held liable because it

had received the benefits of the contract. Citing the *Argenti* case for this estoppel point, Justice McFarland, at page 436, says: "It is only when the subject matter of the contract is entirely outside the scope of the corporate powers, or the contract in question is clearly prohibited, that the plea of *ultra vires* will be listened to." As to the dicta, concerning the applicability of the *Argenti* case, Justice McFarland distinguished the *Zottman* case, on the ground that:

First. In the *Zottman* case the subject matter of the contract was without the power (under the Charter) of the City; in fact, the City was prohibited from making such a contract.

Second. The City Council in the principal case did absolutely approve claimants claim and ordered them paid.

Third. (Pages 439-40.) "And again, there was in the case at bar not merely one isolated addition to the real property of the City which the latter was not compelled to remove in order to show its want of consent; there was a continuous reception and beneficial use of the water furnished by the respondent daily and hourly during the entire year. It may be conceded, however, that there are expressions in the opinion in the *Zottman* case somewhat at variance with the former cases above referred to; but they are also at variance with subsequent decisions of this Court which, we think, fully recognize the principle declared in the earlier cases. Among these subsequent cases are the following: * * * * *Brown* vs. *Board of Education,* 103 Cal. 530. * * * * *Higgins* vs. *San Diego Water Co.,* 118 Cal. 524. * * * * *Sacramento County* vs. *Southern Pacific Company,* 127 Cal. 217."

Beatty, Chief Justice, in his concurring opinion in *Contra Costa Water Co.* vs. *Breed,* again states his views most strongly on the question of the liability of cities on such contracts, and decides that (pages 445-6):

"With respect to water supplies, the provisions of the City Charter regulating the mode of entering into contracts have no application. * * * * But as to the small portion of plaintiff's claim for other supplies these charter provisions do control. * * * * In Justice McFarland's opinion they (the objections of appellant) are met by a reaffirmance of the doctrine of estoppel, announced in the opinion of Justice Cope in *Argenti* vs. *San Francisco,* 16 Cal. 265."

Pages 446-7. "That is a doctrine to which I have never subscribed, and which I had supposed was finally laid at rest in this court. I particularly object, therefore, to being quoted in approval of it. In the opinion of Justice McFarland it is said

that I cited the *Argenti* case in support of my opinion in *Higgins* vs. *San Diego Water Co.*, 118 Cal. 524. This is true; but a reference to my opinion in that case (*San Diego Water Co.* vs. *City of San Diego*, 118 Cal. 556) (this should have read in Chief Justice Beatty's concurring opinion, '*Higgins* vs. *San Francisco Water Co.*, 118 Cal. 555.') will show that I was particular to refer, not to the opinion of Justice Cope, from which Justice McFarland makes his quotation, but to the opinion of Justice Field, who expressly dissented from the views of Justice Cope. It is true, also, that in *Sacramento County* vs. *Southern Pacific Co.*, 127 Cal. 217, the doctrine of estoppel as applied to cases like this, was again asserted upon the authority of Justice Cope's opinion in *Argenti* vs. *San Francisco*, from which a long quotation was made in the opinion as filed and as originally reported. (59 Pac. 570). But in my dissenting opinion in that case (127 Cal. 226) I called attention to the fact that the expressions quoted from *Argenti* vs. *San Francisco*, 16 Cal. 256, had never been the law even of that case; that it was but the opinion of a single judge, not concurred in by either of his associates, and deliberately renounced by him in the subsequent case of *Zottman* vs. *San Francisco*, 20 Cal. 96. In consequence, I suppose, of this criticism, all reference to *Argenti* vs. *San Francisco* was stricken out of the opinion in *Sacramento* vs. *Southern Pacific Co.*, when it came to be reported (127 Cal. 222) and for the same reason, when the case of *Croley* vs. *California Pacific Co.*, 134 Cal. 557—a case involving a second installment, claimed under the same contract, and presenting the same questions—came here for review, it was decided upon an entirely different ground, and the doctrine of the *Argenti* case never so much as alluded to, although pressed upon the attention of the court under the claim that it had become the very law of the case by virtue of the former decision.

"As to what was decided in *Higgins* vs. *San Diego Water Co.*, 118 Cal. 524, it is clear that upon Justice Cope's doctrine of estoppel the City would have been liable on the written contract, for it had been fully complied with by the water company, and the City had enjoyed all the benefits for which it had stipulated. But we held the written contract to be invalid, because violative of the constitution and the city charter, and allowed a recovery only upon the *quantum valebat* count upon an implied contract, which was in no wise in conflict with the constitution, and lacked conformity to the city charter only in respect to a provision designed for the protection, not of the City itself, but of prior contractors, to whose earlier and valid claims the revenues of the City had been already pledged. It was not considered that

under this provision of its charter the City could resist a judgment limited in amount to the actual value of what it had received and payable only out of its unappropriated revenues. Entertaining these views, I could not concur in that portion of the judgment which in my opinion depends upon the doctrine of estoppel as stated in the Argenti case."

See discussion of this case in *Fountain* vs. *City of Sacramento,* 1 Cal. App. at pages 466-67 (infra page 65).

3. OF COURSE, IF THE CITY ACTS ENTIRELY WITHOUT ITS POWERS, IN ATTEMPTING TO BIND A PARTY, THE SAME RULE WOULD APPLY TO EXEMPT THAT PARTY FROM ANY LIABILITY UPON THIS ATTEMPTED OBLIGATION.

City of Arcata vs. *Green, et al.* (Advance sheets, Cal. Dec., Vol. XXXVIII, page 648, Dec. 24, 1909.)

In this case action was brought by the City for the enforcement of the penal clause in a bond furnished by defendants, upon their receiving by ordinance of the City, a grant to construct and operate an electric railroad over certain streets in the City, upon the condition that they would within a stated period commence and complete the construction of such railroad between such city and another municipality. The bond was given to guarantee that the work would be so commenced and completed. It was required by the ordinance itself.

The court ruled, Justice Sloss writing the opinion, that since the power to make such a grant is legislative in its nature, that it is not referable for its support to the power of making contracts, but rather to the legislative power. The legislative body of the City of Arcata had no authority to prescribe conditions operative without that city. At page 652 the court says:

"The condition here imposed was that the grantees should, within certain periods, commence and complete the construction of their road between Eureka and Arcata and through Arcata. So far as this related to the construction between the two cities, it was as clearly extraterritorial as the provision in the South Pasadena case." (*South Pasadena* vs. *Terminal Railway Co.,* 109 Cal. 315.)

And for that reason, it was held that the Board of Trustees of Arcata were acting entirely without their powers in demanding such an undertaking, and so no recovery could be had.

At page 651 the court says:

"As between private individuals or corporations, having a general power to make contracts, this would undoubtedly have constituted an agreement binding upon the parties to it. Here, however, one of the parties to the alleged contract was a municipal corporation. As such, it had only such powers as were expressly or by necessary implication conferred upon it by the constitution or by statutes passed under the constitution. (*Herzo* vs. *San Francisco,* 33 Cal. 134; *ex parte Frank,* 52 Cal. 608; *McCoy* vs. *Briant,* 53 Cal. 250; *South Pasadena* vs. *Terminal Railway Co.,* 109 Cal. 315) Section 862 of the Municipal Corporation Act, the only law relied on by appellant as the source of the power to grant the franchise, authorizes the city trustees to permit the laying of tracks, etc., 'under such restrictions as they deem proper.' Conditions may be attached to the grant. But the power to make such grant, and to impose conditions upon it is 'legislative in its nature; * * * * and is not referable for its support to the power of making contracts.' (*South Pasadena* vs. *Terminal Ry. Co.,* supra.) Unless the condition or 'restriction' was one within the scope of the legislative power of the municipality, it can not be supported as a contract. (*City of Aberdeen* vs. *Honey,* 35 Pac. (Wash.) 1097.)"

Discussing the theory that the defendants were estopped from denying the power of the trustees to exact the undertaking, we have this estoppel theory urged as applying, not against the city, but against the other parties to the contract, and at pages 652-3 the court disposes of that question as follows:

"The appellant urges that the defendants, having received the grant which they sought, are estopped to deny the validity of their undertaking which they gave in consideration of such grant. But we think the doctrine of estoppel has no just application here. A party contracting with a city regarding a subject-matter within the scope of the city's powers may, where he has received the benefit of the contract, be precluded from asserting that the contract was not, on the part of the city, executed in the manner required by law.

"The doctrine, however, cannot be made to cover contracts entirely beyond the range of the municipal authority. 'If this doctrine be established, then corporations, no matter how limited their powers, may make themselves omnipotent. They have only to induce persons to contract with them beyond the scope of their powers, and their very usurpations have the effect of conferring powers on them which the legislature has withheld. A

proposition so erroneous can scarcely need argument to overturn it. * * * * We cannot apply the doctrine of estoppel to such a case as this.' (*City Council* vs. *Montgomery etc. Co.*, 31 Ala. 76.)''

4. AGENCY THEORY. IF THE LEGISLATIVE AUTHORITY OF A CITY AUTHORIZES A CITY OFFICIAL TO CONTRACT FOR THE CITY THAT OFFICIAL MUST ACT STRICTLY WITHIN THE SCOPE OF HIS AGENCY, AND CAN NOT GO BEYOND THAT IN BINDING THE CITY.

Where a contract for street work, entered into by the Superintendent of Streets, is not in compliance with the resolutions of the Board of Supervisors by which it is authorized, the contract is void as to that portion so made without authority. *Chambers* vs. *Satterlee*, 40 Cal. 497.

(Page 527.)

''It then became the duty of the Superintendent of Streets to enter into a written contract with the contractor binding the latter to the performance of the work ordered by the Board, at the agreed prices and within the stipulated time. In performing this duty the Superintendent of Streets was, pro hac vice, the agent of the Board with authority to execute the contract which had been awarded, and no other or different contract. He occupied towards the Board in this respect the relation of a special agent, having a limited authority to execute the contract for the particular work specified in the order of the Board, which was to grade the street to the official grade.''

CHAPTER III

THE THIRD STANDPOINT FROM WHICH WE MAY VIEW OUR SUBJECT, AND THE MOST GENERALLY DISCUSSED PHASE, IS THE APPLICATION OF THE RULE THAT WHEN CITIES ATTEMPT TO MAKE CONTRACTS "THE MODE IS THE MEASURE OF THE POWER."

A. WHEN A CHARTER OR STATUTE PRESCRIBES A MODE OF A CITY'S ENTERING INTO A CONTRACT, THIS MODE CONSTITUTES THE MEASURE OF THE POWER, AND THIS POWER OF A MUNICIPAL CORPORATION IS MEASURED STRICTLY BY ITS CHARTER.

THE SAME STRICT RULE IS FOLLOWED IF THE LAW SPECIFIES THE MANNER IN WHICH CONTRACTUAL OBLIGATIONS SHALL BE LIQUIDATED, AND PERSONS DEALING WITH A MUNICIPAL CORPORATION MUST TAKE NOTICE OF THESE LIMITATIONS.

And, there is not a single California case, treating this subject from this "mode in the measure of the power" standpoint, that denies the above propositions.

Zottman case (supra, pages 10-16), at pages 101, 102, 108, 109.

French vs. *Teschemaker* et al., 24 Cal. 518, cites the *Zottman* case, at page 550, for the rule that "the mode constitutes the measure of the power" of a municipal corporation to subscribe to the stock of a private corporation in accordance with power specially given by legislative enactment:—the subscription must be made in the mode and manner prescribed in the act.

If the law requires a contract for street work to be let upon competitive bidding, and a contract is let without bidding, and the work done, recovery cannot be had against the City.

City Improvement Co. vs. *Broderick,* 125 Cal. 139. (Justice Henshaw writing the decision.)

Where the municipal authorities of a city act under an authority derived from a statute, they must strictly follow its provisions.

Glass vs. *Ashbury*, 49 Cal. 571.

The City of San Francisco attempted to accept use of a training ship for boys, from the United States government, under an Act of the Legislature, which Act the United States government did not regard in offering the ship, since the Act of the Legislature provided, and the Act of Congress forbade, the use of the ship as a place of imprisonment for youthful offenders. The commander of this ship presented his bill for services, which was allowed by the Board of Supervisors. It was ruled that the Auditor was justified in refusing to audit the bill.

Under the Act of April 4, 1870, a contractor is given the right, after street work is done, instead of collecting the street assessment himself, to have the City collect for him, and in case of failure through no fault of the contractor, the Board of Supervisors is required to pay the amount due out of the street department fund. In *Daly* vs. *San Francisco*, 72 Cal. 154, it was held that the contractor acquired no right to maintain an action against the City to recover the contract price after the assessment therefor has been finally adjudged invalid, *unless the contract under which the work was done is valid and binding on the City and County.*

Pages 156-7. "The rule here has always been that there must be a valid contract before any liability can attach to the municipality. It can only act in the mode prescribed by law. This principle has been too often declared here to require reiteration. The City and county incurs no liability for work done under a void contract, nor is there any guaranty on the part of the city and county that the forms of law have been complied with because its officers, without authority, attempt to contract. Those dealing with the city must see to it that its agents have power to act."

Higgins vs. *San Diego Water Co.* (supra, pages 8-9), 118 Cal. 524; see Syllabus, paragraphs 6 and 8;
McCracken vs. *City of San Francisco* (supra, pages 36-9:42) 16 Cal. at 619;
Herzo vs. *San Francisco* (supra, pages 46-9), 33 Cal. at 148;
Wallace vs. *Mayor of San Jose* (supra, pages 22-3), 29 Cal. at 186.

A good statement of the rule that the powers of a municipality are measured strictly by the Charter, is found in *City of Oakland* vs. *Carpentier,* 13 Cal. 540. There was no question here involved of implied contracts, or *quantum meruit,* for actual services rendered. The trustees of the town of Oakland had granted to one Carpentier the exclusive right and privilege of constructing wharves, piers, and docks, at any point within the corporate limits of the town, with the right of collecting wharfage and dockage, at such rates as he might deem reasonable, for the period of thirty-seven years. The Charter gave these powers to the Board of Trustees, and the case holds that these powers could not be thus delegated to another.

The Court says, page 545:

"The rules in relation to the construction of charters of corporations are familiar. They are special grants of power emanating from the paramount authority. The corporation, owing its existence to the law, is precisely what the law makes it. It has no powers except those expressly given, or which are necessary to the exercise of those expressly given. The general legislative power residing in the State Government may delegate to a municipal government some portion of its own powers; but these grants are held in subordination to the general power, and are not construed as taking from that government any other powers or rights than those clearly granted. These delegated powers, given for local objects, are regarded as trusts confided to the hands in which they are placed, and are not subject to be delegated by the repositories of them."

In *Branham et al* vs. *Mayor and Common Council of San Jose et als.,* 24 Cal. 585, it was held that a Sheriff's execution sale following a foreclosure judgment obtained in a suit on a mortgage of pueblo lands made by an Ayuntamiento (town council), was void and the sheriff's deed gave no title inasmuch as the town council in the first place had no power under the law creating it to mortgage the pueblo lands. The question of contract between the execution sale purchasers and the town council does not arise—as there never was any privity or contract between said parties at all.

Sanderson, Chief Justice, gives a very illuminating exposition of the limitations on the powers of municipal bodies—and of the notice that everybody has who deals with such bodies or with property which such bodies have previously attempted to exercise powers of disposition over.

At pages 604-5 he says:

"It is obvious that the Ayuntamiento being merely the agents of the pueblo, in the language of Mr. Justice Baldwin (in *Hart* vs. *Burnett*, 15 Cal. 580), 'acting under defined and expressly limited powers,' could not bind the property held in trust by them for community purposes by any act not strictly within those powers, either by way of contract, or by the mere sufferance of judicial proceedings. Were such the case, the law of corporate power would be made subservient to the adversary will of those in whose hands its temporary exercise is placed. The subsequent judicial proceedings imparted no sanctity to the transaction, nor added thereto any validity in law which it did not previously possess. Whatever right or interest the mortgage created and vested in Aram, Belden and Reed (the mortgagees), the decree of foreclosure operated upon and subjected to the payment of their debt, but nothing more. If the pueblo's interest in the land was unaffected by the mortgage, and nothing passed, it was equally unaffected by the decree and subsequent sale. Parties dealing with the authorities of a municipal corporation are chargeable with full knowledge of their powers, and act at their peril. If the authorities transcend their powers, the act is a nullity, by which the municipality are as much unaffected as if it were the act of a stranger, and it cannot be transformed into a validity, except by the will of the sovereign. In all such cases there is involved only a question of power, which lies at the foundation, and if that fails the superstructure must fail with it. We hold, therefore, that all the proceedings, up to and including the Sheriff's deed to Branham and White (the execution purchasers), were utterly void, and that the interest of the pueblo, and its successor, the city, in the lands in question, were wholly unaffected thereby."

The Charter of Los Angeles required that the Mayor must sign all contracts before the City could be bound on them. The Plaintiff claimed damages for the prevention of performance of a written contract with the City to construct a public sewer. The contract was not signed by the Mayor. The case was held for Defendant.

Frick vs. *City of Los Angeles*, 115 Cal. 512, at page 516:

"It is urged that 'in equity' the instrument must be regarded as though the Mayor had signed it. Nothing appears in the complaint tending to bring the case within any principle on which equity aids or ignores the defective execution of an instrument. The charter provided a mode in which the city could

become bound, and certainly equity will not decree that it shall be bound in some other way in favor of parties who have suffered no detriment except the conjectural loss of profits they might have made by performance of the contract if it had become really an obligation of the city."

In the above case the Defendant demurred to the Complaint, on the ground that it did not set forth that the Mayor had signed the contract. It was held that the demurrer should have been sustained.

Pacific Electric Co. vs. *City of Los Angeles* (Circuit Court S. D. California), 118 Fed. 746—at 753-6, interprets very strictly a California Statute of March 11, 1901, requiring all franchises granted by municipal corporations to be sold to the highest bidder, and prescribing that every franchise "shall be granted upon the conditions in this Act provided and not otherwise." It provides that notice should be published and sealed bids received, to be opened at an hour fixed in the notice: that "at the time of the opening of said bids any responsible firm or corporation present or represented may bid for said franchise or privilege a sum not less than 10 per cent above the highest sealed bid therefor, and said bid so made may be raised 10 per cent, by any other responsible bidder present and said franchise or privilege shall finally be struck off, sold and granted * * * to the highest bidder therefor." It further provides that the successful bidder shall pay the amount of his bid within twenty-four hours, and that if he or it shall fail to do so, then the said franchise or privilege "shall be granted to the next highest bidder therefor." It was held that the authority of the City Council, in the failure of the accepted bidder to deposit the amount of his bid as required, was limited to the granting or refusing of the franchise to the next highest bidder and its acceptance of an oral bid thereafter made was *ultra vires* and created no valid contract.

At page 753:

"In determining whether or not the council, in its proceedings for the disposition of said franchise, lawfully complied with the requirements of said Act of 1901, the rule that mode is the measure of power, and aside from the designated mode there is no power, should be carefully observed."

McBean vs. *San Bernardino*, 96 Cal. 183.

Under the provisions of the Act of March 18, 1885 (Stat. 1885, page 147), a city is only liable for work done in the construction of sewers, when it has expressly contracted to pay for such work out of its funds, or when, in order to raise the neces-

sary amount to pay for such construction, the assessment upon any lot would exceed one half of its valuation in the last assessment for municipal taxes, in which case the excess is to be paid by the City.

The act provided "that in no case, except where it is otherwise actually provided in this Act, will the City, or any officer thereof, be liable for any portion of the expense, nor for any delinquency of persons or property assessed."

A contract with the City for sewer construction, was fully performed, and thereafter, a resolution of the board of trustees of the city was passed, agreeing to pay the amount claimed to be due from the City, which amount was not due under the original contract, because of the above statute. It was held that the provisions contained in this resolution were without consideration, and did not impose a binding obligation upon the City.

At pages 187-8 the Court says:

"It is claimed by appellant that, whatever view may be taken of defendant's liability upon the original contract, as it actually received the benefit of the work done under such contract, this resolution is sufficient to render the city liable to pay therefor, to the extent therein named. The resolution was passed after the contract was fully performed, and it is clear that before its adoption the city was in no wise liable to pay for any part of the work, the contract expressly providing that it would not be called upon to pay for such work except as provided in the statute under which the contract was made, and the complaint not alleging such facts as would make the city responsible under this statute. This being so, the question is directly presented, whether this naked declaration or resolution of the board of trustees had the effect to create a binding obligation where none existed before. We are of the opinion that it did not. The resolution is without any consideration to support it, and if it had been executed, the payment of the money named in it would have been in the nature of a gift, a purely voluntary payment by the city. *It cannot be said even that the defendant was under any moral obligation to pay for this work. Cities are creatures of law, and their powers are defined by law, and persons dealing with them are chargeable with notice, not only of the extent of their powers, but also of the mode in which their powers may be exercised.* It is very evident that the Act of March 18, 1885 (Stats. 1885, p. 147), in expressly naming the cases in which cities shall be liable in the construction of sewers, and in directing that every contract for this work shall expressly provide that

the city shall not be liable except as provided in that act, intended to place a limitation upon the power of the city to contract an indebtedness for such purposes to be paid for out of the municipal treasury. The intention of the statute is, that improvements of this character shall be paid for by assessments upon adjacent property, unless the city, at the time of undertaking the work, shall determine to 'assess the cost and expense thereon upon the property to be affected or benefited thereby, in such manner and within such assessment district as it shall prescribe,' or shall determine to pay for the same out of its street contingent fund, or by the issuance of bonds."

The Charter of the City of Eureka provided that:

"The City of Eureka shall not be, and is not, bound by *any contract,* or in anyway liable thereon, unless the same is made in writing by order of the council, and the draft thereof approved by the City Attorney and the Council and the same ordered to be signed by the Mayor or some other person authorized thereto in behalf of the City: but the Council, by an ordinance, may authorize an officer, committee, or agent of the city to bind the city without a contract in writing for the payment of any sum of money not exceeding three hundred dollars."

This requirement was strictly construed and mandamus refused to compel the defendant, as treasurer of the City to pay a warrant in favor of plaintiff for printing done by plaintiff for the city, though sealed proposals had been advertised for—a sealed bid received and accepted by the council, and an order made by the Council that a warrant could be drawn.

Times Publishing Co. vs. *Weatherby,* 139 Cal. 618.

The Board of Supervisors of San Francisco authorized the purchase for Fifteen Thousand ($15,000) Dollars, of Shag Rock, for use as a site for a small-pox hospital. The Treasurer refused to pay it, mandamus was sought to compel payment, and it was ruled that mandamus would not lie, because the Board never under the consolidation act or any other law, had any power to buy real estate for a small-pox hospital.

Von Schmidt vs. *Widber,* 105 Cal. 151.

At pages 157-8, Justice Harrison says:

"The rule is so familiar as to be trite that a municipal corporation can exercise only such powers as have been conferred upon it in its charter, or by some general law, and that any person in dealing with it is charged with a knowledge of every limitation upon its power to contract a liability. This rule is

not, however, to be so considered as to require an authority in express terms for the performance of every municipal act. If an express power to accomplish some result has been conferred it will carry with it the authority to do such subsidary acts as are incidental and necessary to the exercise of that power. The rule, as stated by Mr. Dillon (1 *Dillon on Municipal Corporations,* 4th ed., sec. 89), and approved in various authorities, is that 'it is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: 1. Those granted in express words; 2, those necessarily or fairly implied in or incident to the powers expressly granted; 3, those essential to the declared objects and purposes of the corporation—*not simply convenient, but indispensable.* Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.' And in section 91 the same author says: 'The rule of strict construction of corporate powers is applicable to grants of powers to municipal and public bodies, which are out of the usual range, or which may result in public burdens, or which in their exercise touch the right to liberty or property, or, as it may be compendiously expressed, any common-law right of the citizen or inhabitant.' There is a marked distinction between the incidental powers that are implied in favor of the acts of a business corporation and those of a municipal corporation. The inability of a business corporation to avoid its obligation upon the plea of ultra vires, when it has received and retained the consideration for its obligation, has no application to a municipal corporation. The former is organized for the profit of its members, and its executed acts in purported furtherance of that object, unless restrained by its charter, or prohibited by positive law, will be upheld; whereas municipal corporations are organized for governmental purposes, and invested with a portion of the authority which properly appertains to the sovereign power of the state, and can exercise only such powers as are expressly conferred or necessarily implied. As the power of raising money by taxation is conferred for the purpose of defraying the public expenditures, and is to be exercised only for the purpose of meeting such expenditures, the limitation upon this power is effected by limiting the objects for which the moneys may be expended. This power of taxation is one of the highest attributes of sovereignty, and, as a municipality seeking to exercise it must find express authority from the legislature, so its powers to disburse the public moneys, being correlative to the power of taxation, must equally find express authority for its exercise. The purchase of real estate, by itself considered,

is not the exercise of any governmental function, and such purchase by a municipality can be sustained only by the production of an express authority from the legislature therefor, or upon its being shown that it is necessarily incidental to the exercise of some express function of government with which the municipality is charged.

"It is conceded in the brief on behalf of the respondent that there is no statutory provision which in so many words states that the City and County of San Francisco shall have the power to purchase a site for a smallpox hospital; but it is contended by him that such power is inherent in a municipal corporation, and necessarily incident to the powers already granted, and to the discharge of its governmental functions; and in support of this proposition he cites certain provisions of the Consolidation Act, and certain statutes subsequently enacted."

The Court then discusses several sections of the Consolidation Act and of other Acts, none of which give this power to the City.

Fountain vs. *City of Sacramento*, 1 Cal. App. 461.

This was an action for the value of 44,000 bricks alleged to have been sold and delivered to the City of Sacramento, of the value of $440. The bricks were used by the defendant. The Charter provided that "no contract for the payment of more than one hundred dollars shall be effective unless authorized by a vote of the Board of Trustees" of whom there were nine. The Mayor must approve or disapprove. If he disapprove the contract can become valid only on the affirmative vote of six of the trustees and the signature of the Mayor. The Charter further provides that "should the Board, or a majority thereof, contract or create any debt against the City contrary to the provisions of this Charter, such debt, claim or obligation shall be null and void as against the City or any of its funds."

These bricks were delivered at the request of C. W. Paine, one of the trustees of the City, and this trustee told plaintiff that the City would pay for them. Part of the bricks delivered were actually paid for by the City.

It was held that since there was no express contract made in accordance with the terms of the Charter, and since the Charter expressly provided that the City would not be liable except upon such a contract, that plaintiff could not recover.

Chipman, Presiding Justice, said, pages 463-4:

"It is perfectly clear that there was no express contract, as the court found. The Charter forbids any kind of a con-

tract for the expenditure of more than one hundred dollars, unless authorized by a vote of the Board of Trustees given in the manner therein provided. It must be upon some principle of estoppel or upon an implied contract or liability arising independently of charter provisions that relief may be given, if at all. The case may appear to justify the doctrine of equitable estoppel as applied in some cases decided by our Supreme Court, cited by appellant. It seems to us, however, that if any substantial or practical results are to be achieved by the restrictions upon the powers of municipal boards of trustees to incur liabilities, which have been placed in charters, it will be impossible to bring any such results about if the provisions must give way under all circumstances to the principle upon which equitable estoppels are generally applied. Plaintiff must be charged with knowledge of the charter provisions in force when he delivered the bricks. He therefore knew that a single trustee—one out of nine—could not legally act for all, and there is no pretense that this trustee was acting as the agent of his co-trustees or that he assumed to so act. And if he had assumed to be acting for all, and plaintiff so understood it, the principle of ostensible agency does not extend to such a case. Plaintiff would still be put upon inquiry as to the trustee's authority to so act, for plaintiff is presumed to have known that no liability against defendant for over one hundred dollars could be legally created except in the manner provided by the Charter. It appears that Mr. Paine acted without consulting his co-trustees, and in entire disregard of charter provisions. It does not appear, except inferentially, that the other trustees had any knowledge of the transaction relating to the forty-four thousand bricks. They seem to have had some knowledge as to nine thousand, for they caused the claim for them to be paid. The charter restrictions were enacted to protect the property holders of the City, plaintiff among them, against just such transactions as this one. Plaintiff acted as much in violation of the Charter as did the trustee who bargained with him. These facts and considerations take from the final action of the trustees, in rejecting the claim, much of its apparent inequity. Instances are becoming too frequent where parties endeavor to fix illegal liabilities upon municipalities under the doctrine of equitable estoppel, thus seeking to avoid injurious consequences which they knowingly brought upon themselves."

In distinguishing certain cases decided by our Supreme Court, Justice Chipman says, page 464:

"The courts have in some cases of peculiar hardship, and

where the circumstances seemed to demand it, come to the relief of persons dealing with municipalities." And then specifically distinguishing *Sacramento Co.* vs. *Southern Pacific Co.*, 127 Cal. 217; *Contra Costa Water Co.* vs. *Breed*, 139 Cal. 432; and *Higgins* vs. *San Diego Water Co.*, 118 Cal. 524, Justice Chipman says, pages 466-7:

"*Sacramento Co.* vs. *Southern Pacific Co.*, 127 Cal. 217 (59 Pac. 568, 825), was a case where the supervisors of the county agreed with defendant to share the cost of a bridge to be used jointly by the people for general travel and by defendant for a railroad track. The bridge was completed under the contract which was entered into by plaintiff and defendant, in good faith and upon advice of plaintiff's law officer, and defendant was paid by plaintiff for its expenditures as provided by the contract. Subsequently the county undertook to recover back this money, but the court held against it, although apparently conceding that the contract might have been declared void had timely proceedings been instituted. We can conceive of many reasons why the county should be estopped from recovering back money paid out under such circumstances which would not apply here.

"In the *Contra Costa Water Company* case the circumstances were peculiar and quite different from the facts in the present case. It appeared that 'the City Council, in its corporate capacity, did absolutely approve respondent's claims and ordered them paid.' Furthermore, 'there were no "restrictions imposed by the charter" absolutely prohibiting the action of the City Council involved.' Besides, the City was under the necessity of having water from day to day, and in point of fact, the claims made out and ordered paid by the Council were at a less rate than had been declared reasonable by the ordinance of the City. The principle of estoppel was applied, as in the Sacramento County case, but there is a broad distinction between the two cases and the one here.

"*Higgins* vs. *San Diego Water Co.*, 118 Cal. 524 (45 Pac. 824, 50 Pac. 670), was likewise peculiar in its circumstances. For an explanation of the scope of the decision we refer to concurring opinion of Chief Justice Beatty in *Contra Costa Water Co.* vs. *Breed*, 139 Cal. 432 (73 Pac. 187), in which he shows how it came about that recovery could be had upon *quantum valebat* while denying the validity of the contract. The case lends no strength to appellant's contention.

"Whatever may have been the reasons in the cases cited by appellant for avoiding the enforcement of the restrictions upon the powers of municipalities there involved, we do not think the doctrine of equitable estoppel should be extended to the pres-

ent case, or any similar case. To do so would be to throw down all the bars that have been raised to protect the people from the consequences of charter violations and would smooth the way to dangerous inroads upon municipal treasuries. There may be an apparent injustice in some cases in adhering strictly to charter provisions. Individuals may suffer, but it is better so than that entire communities should be deprived of the protection given them against infractions of the law by which they are governed, especially where the loss falls upon one who has knowingly taken upon himself the risk of loss."

The reference to Chief Justice Beatty's concurring opinion in *Contra Costa Water Co.* vs. *Breed*, 139 Cal. at 446, is to that portion wherein the Chief Justice says:

"In the opinion of Justice McFarland (in the *Contra Costa* case) it is said that I cited the *Argenti* case in support of my opinion in *Higgins* vs. *San Diego Water Co.*, 118 Cal. 524. This is true; but a reference to my opinion in that case (*San Diego Water Co.* vs. *City of San Diego*, 118 Cal. 556), (this should have read in Chief Justice Beatty's concurring opinion '*Higgins* vs. *San Francisco Water Co.*, 118 Cal. 555') will show that I was particular to refer not to the opinion of Justice Cope, from which Justice McFarland makes his quotation, but to the opinion of Justice Field, who expressly dissented from the views of Justice Cope."

See *J. M. Griffith Co.* vs. *City of Los Angeles* (Cal. Supreme Court), 54 Pac. 383 (supra pages 17-18).

Brady vs. *The Mayor, etc., of New York*, 16 How. Pr. (N. Y.) 432, is a most instructive case.

It decided that a contract for street work made by a street commissioner which did not follow the Charter requirements for making the contract, is null and void, and can not be recovered on upon the theory of *quantum meruit* even though the work is finished and used by the City: that public officials are in a peculiar position of trust as regards their control over the making of contracts, which contracts being for the benefit of all the people, must be made strictly in accordance with Charter requirements: that there can not be a ratification because there is no one with power to ratify, the City not having such power because it never had power in the first place to make the contract as it was made, any more than the street commissioner did. Furthermore that an act of ratification can not be an ex parte matter; there must be mutuality between the one ratifying and the one for whose benefit the ratification is made.

The Syllabus states the facts as follows:

"The Charter of the City of New York, as amended April 12th, 1853, requires that all work involving the expenditure of more than $250, shall be done by contract on sealed bids, and that all such contracts when given shall be given to the lowest bidder. A contract entered into by the officers of the corporation, in violation of this provision, is illegal and void, and imposes no obligation on the City."

"When the officers of the corporation called for bids for flagging a sidewalk and laying a curb and gutter, and the making of excavation of earth and rock, if any, and stated that the lowness of the bid would be tested only by the price at which the bidders offered to lay the flagging, curb and gutter, held, that a contract awarded upon such a test, when it was impossible to determine by such test who was the lowest bidder, was void in respect to the excavation."

Woodruff, Justice, says, at pages 442-3-4:

"We have thus considered briefly the specific grounds upon which the plaintiff claims to recover, notwithstanding the illegality of the contract, so far as they are distinguishable from the general ground, that the work being performed, accepted and approved by the defendants, they are bound to pay for it whether there was a valid contract or not.

"This ground of claim, we think, is all that arises out of the performance of the work or the acts of the Common Council in relation thereto; and if it be sound, then the plaintiff was entitled to payment either at the contract price, or according to the fair value of the work.

"Before noticing further this general ground of claim, it is proper that we should say, that we concur fully with the referee in his conclusion, that the contract itself was illegal and void, and that the plaintiff, could not, by virtue of the contract, recover the stipulated price for rock excavation.

"And it is material to notice, that the invalidity of the contract results from the want of power to make a contract in the manner this was made, for the purposes for which it was made. It was entirely competent to prescribe in the Charter of the City the mode in which and in which alone, contracts should be made. When the powers of a corporation are limited in the Charter, the acts of its officers and agents beyond the scope of those powers, do not bind the corporation. And when the mode in which the powers of a corporation may be exercised, is especially restricted, the officers and agents may not bind the corporation in any other manner. As Welles, Justice, in *The Farmer's Loan*

and Trust Company agt. Carroll, (5 Barb. Rep. 649), says: 'Where a corporation relies upon a grant of power from the legislature to do an act, it is as much restricted to the mode prescribed by the statute for its exercise as to the thing allowed to be done.'

"Those who deal with a corporation, whose mode of dealing is prescribed in their charter, must take notice of such prescription at their peril. In this case, the contract in question was not given to the lowest bidder.

"The officers of the corporation did not take proposals from those who offered to perform the work, in a form in which it was possible to determine who was the lowest bidder. The plaintiff not only was bound to know this, but he had actual knowledge that neither the invitation for bids nor his offer connected therewith, could enable any one to say who was the lowest bidder. * * * *

"We also observe on the subject generally, that the corporation of the City, in the matter of contracts of this description, are acting not simply as an individual acts in respect to his private interests, nor as a private corporation acts in relation to its property or concerns. They derive no property and gain no corporate benefit from the improvement of streets or other public work. They act as a public corporation in discharge of duties, and the exercise of powers which they hold as trusts for the benefit, (not of the corporation as such), but for the citizens at large and for the public."

And at pages 445-6-7:

"The question then recurs: Are the defendants liable for work done, the contract therefor being illegal and void, because entered into in violation of the Charter? And this question remains to be discussed in two aspects, in the present case. Are they liable to the plaintiff as upon a *quantum meruit*, because the work has been performed and is accepted? And have the Common Council power to waive the original defect in the plaintiff's claim, and by their action affirm his title to recover, so as to give him a right of action notwithstanding the requirements of the Charter have not been complied with?

"The answer to these questions seems to us inevitable and too obvious to allow of extended discussion. If either be answered affirmatively, the restrictions in the Charter become practically null, and the officers and agents, through whom alone the corporation can act, may disregard the statute and in practice repeal it. This, to our minds, is the prominent objection to the plaintiff's claim, and laying out of view every other objec-

tion above suggested to the recovery in this case (except so far as they are connected with this consideration), it seems to us fatal to the plaintiff's case.

"The corporation can only act through its chosen officers and agents. If they not only may pay for work and labor actually done without a compliance with the statute requisites, but are legally bound to such payment, then no contract is necessary, and the restrictions in the statute are a dead letter. If they may dispense with a contract, then, and then only, can they confirm an illegal and void contract, and then also by any acceptance of the work and a confirmation of the contract by resolution, they repeal the statute *pro hac vice*. The relation which the corporation and its officers bear to the subject, the duties they owe to the public, and those upon whom the burden is to fall, and the nature of the powers they possess, forbid us to concede any such force to their acts. By the Charter the power is limited, and it is a familiar rule that corporations can only bind themselves by contracts they are expressly or impliedly authorized to make.

"It may sometimes seem a hardship upon a contractor that all compensation for work done, etc., should be denied him; but it should be remembered that he, no less than the officers of the corporation, when he deals in a matter expressly provided for in the Charter, is bound to see to it that the Charter is complied with. If he neglect this, or choose to take the hazard, he is a mere volunteer and suffers only what he ought to have anticipated. If the statute forbids the contract which he has made, he knows it, or ought to know, before he places his money or services at hazard.

"The analogy drawn from the obligation of an individual to pay for work which he accepts, although there has been no previous contract for its performance, wholly fails to reach the present case. Here, neither the officers of the corporation nor the corporation, by any of the agencies through which they act, have any power to create the obligation to pay for the work, except in the mode which is expressly prescribed in the Charter; and the law never implies an obligation to do that which it forbids the party to agree to do.

"And for the like reason the defendants can not be treated as ratifying the unauthorized acts of its agents. *The difficulty lies not merely in the want of original power in the agents to make the contract, but in the want of power in the corporation itself to make the contract otherwise than in the mode prescribed by the Charter.* An individual having power to make a contract may ratify or affirm it, when made by one who without authority

assumes to be his agent, but if the individual have himself no such power he can no more bind himself retroactively to its performance by affirmance or ratification, than he could have done so prospectively in the first instance. The power to ratify *ex vi termini,* implies a power to have made the contract, and the power to ratify in a particular mode, implies the power to have made the contract in that manner.

"An express resolution directing the plaintiff to perform the work would not have been valid or bound the defendants, and a resolution in any terms ratifying what is done by the officers of the corporation in violation of the Charter, can have no greater effect."

The argument was made that the City having confirmed a street assessment laid upon lands adjacent to the street work, for the purpose of raising money to provide for the expense of this work, that this constituted a ratification of the contract for the street work. On the point of lack of mutuality, the Court said, page 441:

"But in every other respect, the act of confirmation was, as respects the plaintiff, a purely *ex parte* proceeding, operating between the corporation and those whose lands were to be charged, but in no sense constituting an agreement with the plaintiff; and notwithstanding such confirmation, the inquiry whether the plaintiff is entitled to be paid, is, we think, clearly open to investigation."

"Unless there be some mode of purchase which shall be held the measure of their (Board of Supervisors') power, such purchase is not without authority of law. * * * *"

Riverside vs. *Yauman & Erbe Mfg. Co.*, 3 Cal. App. at 649.

Santa Cruz R. R. Co. vs. *Broderick*, 113 Cal. 628 (infra pages 88-90).

S. F. Gas Co. vs. *Brickwedel*, 62 Cal. 641.

Application was made for a writ of mandamus to the Auditor of the City and County of San Francisco, to compel him to audit certain demands for gas furnished to said City and County. The defense of the City was that under the State Constitution no indebtedness could be incurred by a municipality (except in a manner therein stated), exceeding in any year the income and revenue actually received by it—and that this indebtedness did so exceed said income.

It was ruled that this defense was valid, if the facts were as therein stated and it was ordered that proof be taken to ascertain the facts.

The Court says, pages 642-3:

"It must be remembered that all are presumed to know the law, and that whoever deals with a municipality is bound to know the extent of its powers. Those who contract with it, or furnish it supplies, do so with reference to the law, and must see that limit is not exceeded. With proper care on their part and on the part of the representatives of the municipality, there is no danger of loss."

In *Schwartz* vs. *Wilson,* 75 Cal. at 505-6, the ruling of *San Francisco* vs. *Brickwedel* is upheld.

"Were the question discussed in *San Francisco* vs. *Brickwedel* a new one, we might hesitate in reaching the conclusion arrived at there; but in view of the very salutary influence it is calculated to exercise over public affairs, and in view of the fact that since 1882 (the date of the Brickwedel case) all persons dealing with these municipalities must be presumed to have done so in view of the constitutional construction given in that case, we are not inclined to overturn it."

Smith vs. *Broderick,* 107 Cal. 644, follows *San Francisco Gas Company* vs. *Brickwedel,* 62 Cal. 641. It was held that:

"Section 18 of Article XI of the Constitution, providing that 'no county, city, etc. * * * * shall incur any indebtedness or liability * * * * exceeding in any year the income and revenue provided for it for such year,' means that each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year."

"A claim against the City and County of San Francisco, incurred during a particular year can not be paid out of its revenue raised for a subsequent year, notwithstanding such claim had been reduced to a judgment, and provision for its payment had been attempted to be made by the Board of Supervisors by a special tax levied and collected in such subsequent year, and paid into the general fund. And a writ of mandate will not lie to compel the payment of the judgment out of the moneys so collected, nor to compel the auditor to allow the same as a claim against such fund."

The Court, at pages 653-4, says:

"If, at the time of entering into the obligation, there is a limitation upon the extent to which a municipality may enter into such obligation, or upon the extent of taxation for the payment of its liability, or upon the mode in which such payment is to be made, there is no violation of any provision of the constitution, or of any obligation of the municipality, in insisting that the person dealing with it shall be bound by the terms of the law, as they existed when he entered into his dealings with the municipality."

1. DISTINCTION BETWEEN ENGLISH AND AMERICAN MUNICIPAL CORPORATIONS. THE FORMER, DEPENDING UPON PRESCRIPTION FOR THEIR EXISTENCE AND CAPACITY, ARE NOT NEARLY SO STRICTLY LIMITED IN THEIR GOVERNMENTAL POWERS AS ARE THE LATTER WHICH DEPEND UPON THEIR CHARTERS. AND SO ENGLISH CITATIONS ARE NOT OF MUCH VALUE TO US.

The distinction between powers of English and American municipal corporations—the latter being much more limited and restricted because of their deriving their powers by grant from a superior source, is well stated by Justice Rhodes in *Herzo* vs. *San Francisco,* 33 Cal. at page 145:

"It should not fail to be noted that there is a clear distinction between most municipal corporations, as they exist in Great Britain, and those of more recent date in the United States. The former depend upon prescription for their existence and capacity; while the latter find every element of their jurisdiction within their respective charters. Under the system of charters created by the Legislature, defining the corporate powers and the mode of procedure of the corporate authorities, it would be altogether out of the question for the corporation to be bound by acts such as were found in *De Grave* vs. *The Corporation of Monmouth,* 19 Eng. Com. Law C. P. 109."

2. DISTINCTION BETWEEN GOVERNMENTAL AND PRIVATE CAPACITY OF CITY. THERE IS A DISTINCTION DRAWN IN THE CASES BETWEEN A CITY ACTING IN ITS GOVERNMENTAL CAPACITY PURELY AND SIMPLY, AND IN ITS PRIVATE CAPACITY—FROM WHICH WE MAY POSSIBLY INFER THAT THE SAME STRICT OBSERVANCE OF CHARTER REQUIREMENTS IS NOT NECESSARY IN THE LATTER AS IN THE FORMER CASE.

For the distinction between the power of a municipal corporation to contract, and the power to legislate, see *Earl* vs. *Bowen,* 146 Cal. at 760, where the question arose as to power of a city council to contract other than by ordinance. The Charter vested all "legislative power" in the Council, subject to be vetoed by the Mayor, and it "shall be exercised by ordinance"; and it is provided that "other action of the Council may be by order upon motion." A contract was let for city printing, by order—and not by ordinance. At pages 760-1 the Court says:

"We do not think that the making of a contract such as the one here is the exercise of 'legislative power' in its true sense as used in the charter.

"The distinction between the power of a municipal corporation to contract and the power to legislate, considered apart from any express or implied provision of the Charter, is well recognized. The Council acts in a double character; in a public and political character, exercising subordinate legislative powers, and in its private character, exercising the powers of an individual or private corporation."

San Francisco Gas. Co. vs. *City of San Francisco,* 9 Cal. 453, is then cited as follows: "*San Francisco Gas Co.* vs. *City of San Francisco,* 9 Cal. 453, in which it was said that 'the purchase of gas involves only the exercise of a power of a private corporation; it requires the exercise of no political power.' "

And it is stated that Justice McKee in the case of *Los Angeles Gas Co.* vs. *Toberman,* 61 Cal. at page 202, did not intend to intimate that "the distinction above pointed out does not exist, when he spoke of the making of a contract for lighting the streets of Los Angeles as having reference to the legislative power of the Council under the Charter of 1877 * * * *. The point decided did not turn upon the question we are now considering." (Page 761.)

Justice Cope in the *Argenti* case, page 270, cites *Holland* vs. *City of San Francisco,* 7 Cal. 361. In that case the City of San Francisco, by an invalid ordinance, sold some real property. Then later in another valid ordinance, the City, in effect, recognized the first ordinance by referring to it, etc.

The plaintiff, a vendee of the property, sued to recover the money on the ground that the sale was never validly made. It was ruled for the defendant on the ground that the second ordinance recognizing the first made the sale all right: that, while, when a city acts in its governmental capacity purely and simply, it must strictly observe the requirements of its Charter in performing any acts under it—that still, a City has two capacities,

one public and one private, and in selling its own property it is acting in its private capacity—and so, the subsequent ratification of its invalid ordinance made the contract with the vendee valid. For this distinction between City acting in governmental and private capacity, see pages 376-7.

"In the case of *Bailey* vs. *The Mayor and Corporation of New York*, Nelson, C. J., speaking of the distinction between the powers of a municipal corporation, as the *owner* of property, and as a subordinate *government*, says: 'But the distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the Legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the special franchises had been conferred.' 3 Hill, 539, and authorities there cited.

"So in the case of *Lloyd* vs. *The Mayor and Corporation of New York*, 1 Selden, 374, it was held by the Court of Appeals, in 1851, that 'the corporation of the City of New York possesses two kinds of powers—one governmental and public, and to the extent they are held and exercised it is clothed with sovereignty; the other private, and to the extent they are held and exercised, is a legal individual. The former are given and used for public purposes, the latter for private purposes.' And in the case of *Milhau* vs. *Sharp*, 15 Barbour, 210, Edwards, C. J., held that the City of New York, 'so far as it acts in the exercise of its public political powers, and within the limits of its Charter, is vested with the largest discretion; and whether its laws are wise or unwise, whether they are passed from good or bad motives, it is not the province of this Court to inquire. But as regards the acts of the corporation in reference to its private property, it stands upon a very different footing. Such property is held for the common benefit of all the corporators.' 'The mere fact that the forms of legislation are used, will make no difference in the character of the act. It will be, in no sense, the exercise of a political power delegated for public purposes.' It was also held, in that case, that when a municipal corporation acts in reference to its private property, its acts are equally of a private character, and equally subject to judicial control with the acts of a private corporation.

"A municipal corporation, from the nature of the ends intended to be accomplished by its creation, is a compound being, acting in different capacities. A private corporation—as, for example, a bank—acts directly only upon its own agents, and for its own private business purposes. A municipal corporation exercises powers of government over others, not its agents. It can pass laws affecting the liberty and property of others, and compel obedience by the infliction of penalties. But in addition to this *governmental power,* it also possess the capacity to own and dispose of property like an individual, and, like a private corporation, may be a trustee for others. When acting in the capacity of a limited government, and within the limits of its charter, the exercise of its delegated discretion can not be controlled by the judicial department. But when acting as a trustee, either for the corporation, or for others, or for both, its acts are subject to judicial control. In the latter case its discretion must be exercised soundly, like the discretion of any other trustee."

For facts see pages 375 and 377-8.

In the *Argenti* case, page 273, Justice Cope says:

"In *Holland* vs. *The City of San Francisco,* the questions involved were entirely different, and it will be sufficient for us to determine whether we will adhere to the principles of that case, when the same questions are again brought before us."

However, in *McCracken* vs. *San Francisco,* 16 Cal. 591 (supra pages 39-40: 43-4), this *Holland* case is overruled. But while the distinction may not be used to such a limit as it was in the Holland case, it nevertheless does exist for the other purposes here being discussed.

At page 272 of the *Argenti* case, Justice Cope cites *Phelan* vs. *County of San Francisco,* 6 Cal. 531. In this case a statute conferred power upon a Court of Sessions to purchase real property. This statute was unconstitutional. Hence, a contract by the Court in purchasing property was void, and therefore, the City could not be bound by a subsequent ratification by the Board of Supervisors. Had it been voidable only, it could have been so ratified—but, the Court goes on to say, "nay, more, we are satisfied that a deliberative body like the Board of Supervisors, can not be bound by acts *in pais* but that the best and only evidence of its acts and intentions is to be drawn from the record of its proceedings." Justice Cope in the *Argenti* case, refuses to admit that this is a sound statement of the law. At page 272, Justice Cope says: "This was one of the several reasons given

by the Court for its decision, and we do not pretend to say that it was not of itself entirely sufficient. It was not regarded as essential to the determination of the case, and may have been stated in broader terms than the Court intended to employ. We are not required to pass upon the question of its correctness, and it is only necessary for us to say that no such rule exists in reference to the private transactions of a municipal corporation."

For rule that a City when acting in a private or corporate capacity is liable for the acts of its agents for which it will not be liable when acting in a public and governmental capacity, see *Davoust* vs. *City of Alameda*, 149 Cal. 69, where the City of Alameda was held liable for the death of a person who was killed by a live electric wire which had been allowed to lay on the ground, through the negligence of the City which operated a municipal electric lighting plant.

At page 70, the Court says:

"Such a corporation, however, has a double character—governmental, and also proprietary and private, and, when acting in the latter capacity its liabilities arising out of either contract or tort are the same as those of natural persons or private corporations."

See *South Pasadena* vs. *Pasadena Land, etc. Co.*, 152 Cal. at 593;

See *Von Schmidt* vs. *Widber*, 105 Cal. at 158 (supra page 61-3).

For distinction between governmental and private capacity of Municipal Corporations, see *Dillon on Municipal Corporations, Section* 66.

a. BUT IF THE LEGISLATURE IMPOSES A RESTRICTION ON THE SALE OF CITY PROPERTY, MAKING IT NECESSARY FOR AN ORDINANCE TO PASS, FOR SUCH A SALE—THEN WHETHER WE REGARD THIS EXERCISE OF POWER AS GOVERNMENTAL, OR PRIVATE—THE PROCEDURE LAID DOWN MUST BE STRICTLY FOLLOWED.

McCracken vs. *City of San Francisco*, 16 Cal. at 621 (supra pages 36-42).

3. A MERE FAILURE TO PERFORM THE CLERICAL AUTHENTICATION OF A CONTRACT AS PROVIDED BY CHARTER, WILL NOT INVALIDATE THE CONTRACT, WHEN ANOTHER SECTION OF THE CHARTER, SPECI-

FYING THE ESSENTIALS OF A CONTRACT, DOES NOT REQUIRE SUCH AUTHENTICATION.

Interpreting the meaning of charter requirements for the making of contracts, it was held in *Goodyear Rubber Co.* vs. *The City of Eureka,* 135 Cal. 613, that (See Syllabus, 1st and 2nd paragraphs):

1st. "Under a charter of a city providing that a journal of proceedings of the City Council shall be kept by the City Clerk, and that the ayes and noes shall be taken and entered therein on the final action upon the making of the contract, a record of the approval of a contract of purchase made by the Mayor, showing who were present, and that all present voted in favor of a motion to approve the contract, and no one against it, shows a sufficient compliance with the object of the charter."

2nd. "A provision of the City Charter that every contract must be countersigned by the finance committee, numbered, and registered in a book kept for that purpose, must be construed with another section of the Charter which states what essentials are necessary to make a contract binding, and does not enumerate such countersigning, numbering and registering and the provision therefor being intended merely for further authentication of the contract, the contract is not rendered invalid by its absence."

4. THE PROVISIONS OF A CHARTER THAT THE COMMON COUNCIL SHOULD NOT CREATE ANY DEBTS BEYOND A CERTAIN AMOUNT IS MERELY DIRECTORY.

People vs. *Lynch,* 51 Cal. at page 37 affirms the *Argenti* case on this point.

5. THE PROVISIONS OF A STATUTE REQUIRING PLANS AND SPECIFICATIONS TO BE DRAWN BEFORE A CONTRACT CAN BE LET FOR A PUBLIC BUILDING, AND REQUIRING LETTING TO THE LOWEST BIDDER, DO NOT APPLY TO THE FURNISHINGS THEREOF.

In *Sarver* vs. *County of Los Angeles* (advance sheets Cal. Dec., Vol. XXXVIII, page 244, Aug. 27, 1909), Justice Henshaw points out the distinction between a building as such, and mere "furnishings" for the building, the Political Code section requiring plans and specifications to be drawn before a contract can be let for a public building, not applying to the furnishings thereof.

At pages 244-246, Justice Henshaw says:

"Plaintiff, a taxpayer of the County of Los Angeles, sought by his action an injunction to restrain the supervisors of the County from entering into a contract for the construction of certain steel cells within the County Jail. The substance of his complaint is that the County advertised for bids for the work to be performed, as it was required to do under section 4041, subdivision 8, of the Political Code. This section in empowering boards of supervisors 'to cause to be erected, or rebuilt, or furnished, a courthouse, jail, hospital, and such other public buildings as may be necessary,' prescribes that in so doing they shall advertise for bids and let the contract to the lowest responsible bidder and shall erect or construct 'none of the aforesaid buildings * * * * until the plans and specifications have been made therefor and adopted by the board.' It is charged that bids were duly advertised for pursuant to the plans adopted and that upon the opening of the bids the board of supervisors arbitrarily and in defiance of the law refused to award the contract to the lowest responsible bidder, but announced its intention to award the contract to the Pauly Jail Building Company, whose bid was over $6,000 in excess of that of the lowest responsible bidder. The board of supervisors made answer that, while they had adopted general plans and specifications for the proposed work, still from its nature it was impossible to formulate complete plans and specifications, and this because of the different kinds of material which could be employed, of the varying advantages or disadvantages in patented locking devices and for many other like reasons not necessary here to set forth in detail; that the character of the work was, therefore, such as called for the exercise of discretion upon the part of the board in awarding the contract and that in the exercise of this discretion upon the part of the board and for the benefit of the County and its taxpayers it was decided to award the contract to the Pauly Jail Building Company.

"Upon the filing of this answer plaintiff moved for and obtained a judgment upon the pleadings and defendants appeal.

"The question presented upon appeal is whether the work for which bids were received was of a character which made it compulsory upon the board to award the contract, based upon plans and specifications previously adopted, to the lowest responsible bidder, or whether, as appellants contend, from the nature of the work it was impossible so to do and the board was at liberty, therefore, and, indeed, that it became its duty, to exercise a judgment in the matter.

"There can be no doubt but that depending upon their mode

of construction, cells in a common jail may either be a part of the structure or they may be, as here, steel tanks or cages erected within, but quite independent of the jail building. When such is the case these cells become a part of the modern jail furnishings. (*Pauly Jail Building and Mfg. Co.* vs. *Comrs. etc.,* 68 Fed. Rep. 171.) In the erection or reconstruction of a public building the statute contemplates very properly that the contract shall be let, and the work performed, under plans and specifications previously adopted. But there is no such requirement in the case of furnishing a public building. The law does not say that no furnishings shall be purchased except under adopted plans and specifications. It says 'none of the aforesaid buildings shall be erected' except under such adopted plans. And the reason is quite apparent. In the matter of furnishings, something, from the necessities of the case, must be left to the sound judgment and honest discretion of the board of supervisors. Desks, chairs, book shelves, carpets, light fixtures, etc., are of different prices and quality. Many of such articles are manufactured under patents and could be procured but from one source. It would be practically impossible to call for the furnishing of a building under pre-adopted plans and specifications adequate to exclude the necessary play of discretion and judgment, and, as we have said, the law has not undertaken so to hamper the boards of supervisors in the performance of this important duty. In the case at bar it may well be as the appellants plead, that, notwithstanding, the Pauly Jail Building Company's bid was higher in terms of money, it was still the lowest and the best in consideration of the quality of the work, of materials to be used and of patented devices to be employed. That such patented devices may be considered, and, indeed, called for by the board of supervisors, is well settled. (*Nicholson Pavement Co.* vs. *Painter,* 35 Cal. 697; *Dunne* vs. *Altschul,* 57 Cal. 474.)"

The court distinguishes the case of *Ertle* vs. *Leary,* 114 Cal., 238 (infra page 62, c), by pointing out that in that case the jail was a new edifice and the cells an integral part thereof, while in this case "the Los Angeles jail is an existing building with a number of such cells erected therein, and the call in this contract is for the taking into the building steel and other proper material and therein constructing another tier of tanks or cages." (Page 246.)

Ertle vs. *Leary,* 114 Cal., 238, dealt with subdivision 9, section 25 of the County Government Act of 1893, "provided

that none of the aforesaid buildings shall be erected or constructed until the plans and specifications shall have been made therefor and adopted by the board." It was held that the supervisors of a county have authority under this section to erect a jail, under a contract let to the lowest responsible bidder, provided plans and specifications therefor have been first adopted by the board prior to the sixty days' notice of the bidding, upon which the bids are to be based; but they have no authority to let a contract upon plans and specifications to be drafted and submitted by the bidders, thereby preventing competition in bidding, and giving the board an opportunity for favoritism; and the carrying out of a contract so let may be enjoined by suit of a taxpayer.

6. HOW TO PLEAD THE FAILURE TO EXERCISE. POWERS BY THE PROPER MODE. THE DEFENSE BY A CITY TO A SUIT FOR DAMAGES FOR THE PREVENTION OF THE PERFORMANCE OF A CONTRACT WITH THE CITY, THAT THE CONTRACT WAS NOT SIGNED BY THE MAYOR, AS REQUIRED BY THE CHARTER, MAY BE RAISED BY DEMURRER— IF THE COMPLAINT DOES NOT SET FORTH THAT THE CONTRACT WAS SO SIGNED. SUCH FORMAL CHARTER REQUIREMENTS IN THE DRAFTING OF CONTRACTS MUST BE AFFIRMATIVELY SHOWN TO HAVE BEEN COMPLIED WITH.

Frick vs. *City of Los Angeles*, (supra pages 58-9) 115 Cal. 512 at page 516.

In this case, other formal requisites were shown in the complaint to have been met—but, this requirement of the Mayor's signature was not shown.

a. BUT A DEFENSE BY THE CITY THAT A CONTRACT COULD BE MADE ONLY UNDER CERTAIN CIRCUMSTANCES *OTHER THAN FORMAL CHARTER REQUIREMENTS*—AND THAT THESE CIRCUMSTANCES NOT EXISTING, THE CONTRACT WAS BEYOND THE POWER OF THE CITY—AND SO VOID, CAN NOT BE RAISED BY DEMURRER WHERE THE COMPLAINT DOES NOT AFFIRMATIVELY SHOW THAT SUCH CIRCUMSTANCES DO NOT EXIST. IT MUST BE SHOWN BY ANSWER. BUT IF THE CONTRACT IS ONE ENTIRELY BEYOND THE SCOPE OF THE POWERS OF

THE MUNICIPALITY, THIS DEFENSE MAY BE MADE BY DEMURRER.

To reach on demurrer to a complaint the point that a municipal corporation is not bound by a contract made without and beyond the powers of the corporation, it must appear that the contract is one entirely beyond the scope of the powers of the corporation, which could not be legally made by it, under any conceivable circumstances. If the defense rests on the theory that the contract could be made only under certain circumstances, as upon a certain vote in the school district being had, this defense must be made by answer and proof of the absence of these circumstances. This was decided in *Brown* vs. *Board of Education*, 103 Cal. 531, at 534-5, in which case the complaint averred that, at defendant's request, the plaintiff made and delivered to defendant certain plans and specifications for public school buildings, which were approved and accepted, the value of the services was set forth, and the demand for the money, and failure to pay. The complaint was held good on demurrer.

7. "PUBLIC CONSCIENCE" AND THE RIGHT OF LEGISLATURE TO COMPEL CITY TO PAY ILLEGAL CLAIMS.

THE RULE WAS LAID DOWN IN SOME EARLY CALIFORNIA CASES THAT EVEN THOUGH A CITY WAS NOT LEGALLY LIABLE FOR A CLAIM AGAINST IT, THAT IF, IN GOOD CONSCIENCE, IT SHOULD PAY THE SAME, THE STATE LEGISLATURE MIGHT ORDER THAT THE CITY SO PAY. BUT LATER CONSTIUTIONAL PROVISIONS HAVE CHANGED THIS RULE.

In a dictum in *In Re Market Street*, 49 Cal. at page 549 the Court—in discussing an invalid contract, and the right that one had to call upon the "public conscience" for compensation even though he could not compel payment at law, says:

"It would seem, however, that the claim is for compensation for certain work done by Connolly in the year 1868, under an abortive contract, for the opening of this extension, theretofore made between himself and the authorities of the City and County of San Francisco. It may be that the circumstances, when ascertained, would characterize his claim as one affecting the public conscience, and entitling the holder to payment from the appropriate fund, as was done in *Blanding* vs. *Burr,* 13

Cal. 343; *Creighton* vs. *Board of Supervisors,* 42 Cal. 446, and *Sinton* vs. *Ashbury,* 41 Cal. 525".

In *Blanding* vs. *Burr,* 13 Cal. 343, referred to above, (*In Re Market St.*)—a debt had been contracted by the City of San Francisco beyond the amount permitted by the Charter. The State Legislature came to the aid of the creditors by providing for their payment by the issuing of bonds by the city.

Assuming that the claims were illegal and discussing the power of the Legislature to so order the payment of illegal demands, Justice Field says (pages 349-350):

"The question presented, is not one of power in the Legislature to impose upon the corporation the payment of claims for which no consideration has been had, but of power to provide for claims meritorious in their character, for which an equivalent has been received, and from the payment of which the corporation could only escape upon strict technical grounds. That the Legislature can provide for the payment of claims, invalid in the forum of the law, but equitable and just in themselves, would seem unquestionable. It may become, for example, of the highest importance to a municipal corporation that counsel should be employed to defend its rights of property assailed by different parties, but its charter may not confer authority to employ the counsel or to meet his charges. Professional services rendered under such circumstances, would not constitute a legal charge upon the corporation, but that it would be competent for the Legislature to authorize the payment of the charge, and the imposition of a tax for that purpose, no one will deny. Or, take a still stronger case—a city has issued, in pursuance of the law, its bonds—the annual interest is maturing, and the sources of revenue upon which it relied to pay the same have failed, and it has no power to borrow the money within the requisite time, but individuals possessing the means come forward, and at the request of its authorities, advance the necessary money to protect the honor and good faith of the city. A claim for reimbursement would not, under the circumstances, in face of positive prohibitions of the charter to raise money, except in a particular way, be valid and binding, but that the Legislature could authorize its payment, and the raising of the means by taxation without trenching upon any constitutional restrictions, is clear."

Creighton vs. *San Francisco,* 42 Cal. 446 (1871) cited in "*In Re Market Street*"—was a case where a contract for street work was invalid because the principal officer of the city had failed

to sign his name to the resolution under which the work was done. The Legislature thereupon, as a relief measure, ordered the Board of Supervisors to order the contract paid.

At pages 450-1 the Court says:

"The sovereign power of appropriation of the public funds already in the treasury or to be raised by taxation, in favor of individuals, is one, the exercise of which must depend largely upon the legislative conscience, and like most of the great powers of government, can not be interfered with by us, unless in exceptional cases. The most usual cases in which the power has been exercised are those, like the one under consideration now, where an individual, having no legal claim in the sense of being capable of enforcement by judicial proceedings against a municipal government, has, nevertheless, in equity and justice, in the larger sense of those terms, a right to indemnity and compensation out of the Public Treasury. As was said by Denio, J., 3 Kern. 149: 'The Legislature is not confined in its appropriation of the public moneys, or of the sums to be raised by taxation, in favor of individuals, to cases in which a legal demand exists against the State. It can thus recognize claims founded in equity and justice, in the largest sense of these terms, or in gratitude, or charity. Independently of express constitutional restrictions, it can make appropriations of money whenever the public well being requires or will be promoted by it, and it is the judge of what is for the public good.'"

Probably such legislative action as is taken in the above cases would now be forbidden by Art. XI, Sec. 6 of the State Constitution as amended in 1896 " * * and cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution, *except in municipal affairs,* shall be subject to and controlled by general laws." (The words "except in municipal affairs" were inserted by amendment adopted Nov. 3, 1896.)

In *Conlin* vs. *Board of Supervisors,* 99 Cal. 17, it is shown that because of section 31, Art. IV of the Constitution the above Creighton case (decided before the Constitution of 1879) would no longer be followed. That section provides that the Legislature shall have no power "to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever."

In the *Conlin* case the Legislature passed an Act for the relief of a street contractor, appropriating money from the

Treasury of San Francisco for the contractor who had no legal claim against the city because his contract with the city so specified. He had not been able to obtain compensation in the usual way, by reason of errors, omissions and irregularities of the officers of the city, in their official proceedings concerning the work done. Discussing the question of a right against the city on the theory of benefits accruing to the city, Harrison, Justice, says, page 24:

"In *McBean* vs. *San Bernardino*, 96 Cal. 183, a sewer had been constructed under a contract with the City of San Bernardino, which contained a clause exempting it from liability, similar to that in the contracts entered into by the plaintiff herein, and after the completion and acceptance of the sewer, the city passed a resolution authorizing the payment of a portion of the cost of its construction out of the funds of the municipality. In an action to recover this amount it was held that, inasmuch as by reason of this exemption there had never been any liability for the work on the part of the city, the resolution to pay the amount was without any consideration to support it, and that although the city had received the actual benefit of the work, this did not create even a moral obligation to pay for its cost. One of the reasons assigned for this conclusion was that cities are creatures of law, with powers defined by law, and that persons dealing with them are chargeable with notice, not only of the extent of their power, but also of the mode in which their power may be exercised. The principles declared in that case are controlling in this. The Constitution makes the same inhibition on an appropriation of public moneys by the Legislature without any consideration that exists against a similar appropriation by a municipality. The Legislature has no more right to direct a municipality to give away the public moneys in its treasury than had the municipality without such direction.

"We hold, therefore, that the act in question violates the provisions of the foregoing section of the Constitution, and is therefore invalid; and for this reason the judgment is reversed."

CHAPTER IV

THE FOURTH GENERAL WAY IN WHICH OUR SUBJECT IS TREATED IS BY CONSIDERING THE POWER TO SUBSEQUENTLY RATIFY PRIOR UNWARRANTED ACTIONS OF MUNICIPAL BODIES AND THEIR OFFICERS, AND, IF THERE BE SUCH POWER, WHAT AMOUNTS TO SUCH A RATIFICATION

A. RATIFICATION OF ACTIONS DONE ENTIRELY WITHOUT THE POWERS OF A CITY. CONTRACTS MADE BY A CITY OR BY CITY OFFICIALS ABSOLUTELY WITHOUT ITS OR THEIR POWERS CAN NOT IN ANY WAY BE SUBSEQUENTLY RATIFIED.

Power vs. *May*, 114 Cal. 207, is a case of a judgment on the pleadings, which pleadings showed that the plaintiff, District Attorney of Tulare County, had entered into a void contract with John Broder, Clerk of the Board of Supervisors, by which Broder was to and did secure employment from the Board of Supervisors of Tulare County, for a compensation to collect from the State moneys due the county for the care of indigent persons; that he then agreed with plaintiff that the latter should perform the service, and the two should divide the compensation. The contract was void as an attempt by the Board of Supervisors to increase the compensation of a public official during his term of office and as being against public policy. It was ruled that on the pleadings judgment should be against plaintiff who sought mandamus against the Treasurer of Tulare County to compel payment of a warrant for these services. Discussing the question generally of the power of a Board of Supervisors to legally allow a claim for the beneficial use of money, labor or property although the formalities necessary to bind the county have not been employed, Justice Henshaw, at page 208, makes the following very clear statement:

"Can the Board of Supervisors legally allow a claim for the beneficial use of money, labor or property, although the formalities necessary to bind the county have not been employed?

Without entering into an elaborate consideration of this question, it is sufficient to say that this may at times, and under certain circumstances, be done, provided the power to do so be not withheld in the grant of powers to the board, and provided further that the service has been bestowed, or the money expended for the benefit of the county in a manner authorized by law. Under such circumstances, if the board had original power in the premises, it may cure informalities or irregularities in procedure by a subsequent ratification and recognition of its liability."

A contract between a city and a water company for a supply of water to the city, being void, "for want of power in the plaintiff (the water company), for want of power in the Board of Trustees of the City, and for non-conformity with the requirements of the charter of the city, no subsequent acts of the officers of the city in ratification of it would be binding upon the city."

San Diego W. Co. vs. *City of San Diego*, 59 Cal. at 522.

In this case the contract was void—first, because under the laws under which the plaintiff was incorporated it was bound to furnish water to the city free of charge, and to the inhabitants under rates fixed by a Board of Commissioners, which rates were never fixed; second, because the charter gave no power to the Board of Trustees of the City to aid in the construction of public improvements.

In *Berka* vs. *Woodward*, 125 Cal. 119, Justice Henshaw rules that when a city charter and the Political Code forbid a member of the City Council to be interested in any contract made by the council, and a member of such council does contract for the sale of lumber and materials to the city which are delivered and used by the city he cannot recover their value either on an express or an implied contract.

Justice Henshaw draws a distinction between a case where such contracts have not been expressly forbidden by law and are not *malum in se*, but are merely considered contrary to public policy, and a case where such contract is expressly prohibited by law or is *malum in se*. He holds that in the class of cases where the contract is merely contrary to public policy that one might be allowed to recover upon an implied contract, upon a *quantum meruit* or *quantum valebat*.

Discussing these contracts that are merely against public policy, he includes those "where the consideration is in itself

lawful, but where the mode is unauthorized, or where because of some fiduciary relation between the parties, the law will not permit the contract to be made nor countenance it when made." This would seem to say that a contract invalid simply because not made in due form may be the basis of a *quantum meruit* or *quantum valebat,* but it is to be noted that Justice Henshaw is discussing here Section 1667 of the Civil Code which applies to contracts in general and has no special reference to contracts of municipalities, and again, all this is mere dicta, for the point of the case is that when a contract is expressly forbidden by law there can be no recovery as on an implied contract.

Justice Henshaw further, referring to contracts absolutely prohibited by law, distinguishes between the rights that one individual may have against another after the performance of such a contract and those that an individual would have against the public. At page 127,

"For, while as a matter of private justice between individuals it would be but fair that one under such an illegal contract should restore the consideration or should make the payment, the rights of the public are superior to any such private considerations, and the public's right is that the fountains of justice shall remain unpolluted; that no court shall lend its aid to a man who grounds his action upon an immoral or illegal act. Therefore, there is no place for equitable considerations, presumptions, or estoppels. (*Fowler* vs. *Scully*, 72 Pa. St. 456; 13 Am. Rep. 699.) *Ex turpi causa non oritur actio.* Whenever such a contract comes before the court the action must fail, and the parties will be left in the situation in which they may be found. Some slight attempt will be found occasionally to evade the application of this well-settled doctrine upon the ground of the hardship which sometimes results, but in no case, we think, has the existence of the rule been denied, or its justice as a matter commanding public necessity been questioned."

At page 129, Justice Henshaw disposes of the point of ratification by the Council allowing such an illegal claim, as follows: "The fact that the claim was allowed by the Council does not give to it a validity which it otherwise did not possess."

Dictum, *Lucas Turner & Co.* vs. *City of San Francisco,* 7 Cal. 463. (See infra page 92.)

Zottman Case (supra, pages 10-16), 20 Cal. at 102-3 and 106.

Higgins vs. *San Diego Water Co.,* (supra, pages 8-9), 118 Cal. 524, at page 555.
Sutro vs. *Pettit,* (supra, pages 24-5) 74 Cal. 332.

B. RATIFICATION OF ACT DONE WITHIN THE POWERS OF THE CITY BUT NOT FOLLOWING THE PROPER PROCEDURE.

1. THE RATIFICATION ITSELF MUST FOLLOW THE PROPER PROCEDURE WHICH SHOULD HAVE BEEN IN THE FIRST PLACE FOLLOWED IN THE ACT WHICH IS TO BE RATIFIED.

IF THE CONTRACT IS MADE BY THE CITY OR ITS OFFICIALS *WITHIN* ITS OR THEIR POWERS, IT CAN NOT BE RATIFIED AFTERWARDS UNLESS IT IS POSSIBLE FOR THE RATIFICATION TO FOLLOW THE SAME MODE REQUIRED TO MAKE THE ORIGINAL ACT ITSELF VALID AND THE RATIFICATION CAN BE MADE ONLY BY ONE WHO ORIGINALLY HAD POWER TO CONTRACT. "WHERE THE AUTHORITY CAN ORIGINALLY BE CONFERRED ONLY IN A PARTICULAR FORM OR MODE, THE RATIFICATION MUST FOLLOW THE SAME FORM OR MODE." (*McCracken* vs. *City of San Francisco*, 16 Cal. at 623.) BUT SUBJECT TO THIS QUALIFICATION THE CONTRACT MAY BE RATIFIED. SOME OF THE CASES THEREFORE POINT OUT THE DISTINCTION BETWEEN THE POWER OF RATIFICATION IN A MUNICIPALITY BOUND TO FOLLOW A CERTAIN DEFINITE PROCEDURE LAID DOWN IN A CHARTER, AND IN A PRIVATE INDIVIDUAL OR STATE GOVERNMENT WITH NO SUCH RESTRICTIONS ON HIS OR ITS ACTIONS.

Santa Cruz R. R. Co. vs. *Broderick*, 113 Cal. 628.

A street improvement act required that before street improvements could be contracted for by the Board of Supervisors proposals for bids therefor must be invited by the Board, and the Board let a contract without so inviting bids. The work was done and the Supervisors allowed a claim for same but the Auditor refused to indorse his allowance thereon. Mandamus was brought to compel him to allow the claim and it was ruled for the defendant.

The Court says, page 631:

"The advertising for bids is made by the act a condition precedent to the exercise of the power to award 'any' contract, and is a limitation upon the mode in which the previous order for the improvement of the street is to be made effective. Until proposals have been received in accordance with such notice the City Council has no jurisdiction to enter into a contract for the improvement."

At pages 634-5, speaking of the question of the effect of a subsequent authorization for payment for the work after its completion, the Court says:

"The proposition that, because the Board of Supervisors has passed an authorization for payment for the work after its completion, the plaintiff is entitled to recover, can not be maintained. This proposition is independent of the proceedings under the street improvement act, and concedes the invalidity of these proceedings, but rests upon the estoppel against the City by virtue of its promise to pay for the benefits received by it by reason of the performance of the contract. The invalidity of the plaintiff's contract under the street improvement act places it in the same position as any other person dealing with the City under the authority conferred upon its Board of Supervisors. If the Board of Supervisors did not have authority to enter into the contract, they could not bind the City by a subsequent authorization for the payment of the contract price. The provision of section 67 of the Consolidation Act, 'The powers of the Board of Supervisors are those granted in this Act, and they are prohibited to exercise any others,' and the provisions of section 98 of the same Act, 'If any expenditures not authorized by this Act be incurred, they can never be paid out of the treasury, nor shall they be deemed to constitute or lay the foundation of any claim, demand, or liability, legal, equitable, or otherwise, against the said City and County,' preclude any right or recovery by reason of such resolution. In entering into the contract, the plaintiff was charged with knowledge of all the limitations upon the powers of the Board of Supervisors. He knew that the Board had no power to authorize the contract for doing the work, unless it had invited sealed proposals therefor, and he entered into the contract with the knowledge that he had not made any proposal for doing the work. Having thus performed a contract which he knowingly entered into in disregard to statutory requirements, he is not in a position to claim any equitable consideration by reason of its performance. To hold that a municipality may disregard the restrictions

which its Charter places upon its power of contracting, and that, after a contract entered into in disregard of such restrictions has been performed, its subsequent promise to pay for such performance may be enforced, would set at naught all limitations upon municipal powers, and, as was said in *Sutro* vs. *Pettit*, 77 Cal. 337, 'put the people in the complete power of careless or unscrupulous officers.' ''

See supra, pages 85-6, for general language of Justice Henshaw in *Power* vs. *May*, 114 Cal. at page 208, as to the power of ratification when the original act of City authorities is within their power.

The same case came before the Court again, after evidence taken on the pleadings, in *Power* vs. *May*, 123 Cal. 147.

Here we have a subsequent ratification by the Board of Supervisors of a prior act which the Board had power to act upon but had not regularly done, or at least a doubt was raised as to this regularity. An attorney was engaged by the Board to present to the State Board of Examiners, a claim of the County against the State for the care of indigent persons.

At pages 151-2:

''Appellant contends that there was no lawful contract made with the Board by plaintiff because no resolution was passed by the Board authorizing plaintiff to perform the service. The evidence tends to show that plaintiff represented to the different members of the Board that Broder (who had the first contract to do this work) could not perform his contract and was willing that plaintiff should do the work for the Board, and plaintiff offered to do it upon the same terms as were stipulated in the Broder contract. There was no resolution of authority passed by the Board, but the members told plaintiff to go ahead and make the collection and he would be paid at the rate agreed upon with Broder. Plaintiff did the work, collected the money and turned it over to the County and presented his bill for services to the Board. In the bill reference was made to the Broder contract, but the evidence tends to show, and the Court found, that this reference was made to fix the amount of compensation, and not to show that he claimed under the Broder contract. We think the evidence justifies the view of the matter taken by the learned judge who tried the case.

''It is true that there was no previous formal resolution of the Board authorizing plaintiff to perform the service; there was an understanding to that effect, which for some unexplained rea-

son was not entered upon the minutes of the Board. While in all matters of such importance we think the Board should act formally by resolution spread upon the minutes, still, as they had the power to act and the services were performed, and the Board did in fact subsequently approve the bill for the services and ordered it paid, we know of no reason why the subsequent ratification and order of payment should not be treated as equivalent to previous authority regularly given."

The Court expressly holds that the evidence justified the findings that there was no such void and collusive contract as appears from the pleadings in the same case decided in 114 Cal. 207 (supra, pages 85-6).

Brady vs. *The Mayor of New York*, 16 How. Pr. (N. Y.) 432 at 445-6-7 (supra, pages 68-70).

Dicta of Justice McFarland in *Contra Costa Water Co.* vs. *Breed,* 139 Cal. 432, says that ratification may be by resolution of the City Council.

(Supra, page 50.)

McCracken vs. *City of San Francisco,* (supra, pages 37-42, 43, 88) 16 Cal. at pages 620-626;

Pimental vs. *City of San Francisco,* (supra, pages 42-4) 21 Cal. at 362-3;

Grogan vs. *San Francisco,* 18 Cal. at 608-10 (supra, pages 44-5).

For case of proper ratification of contract in first place improperly made (*i. e.*, by following the mode which should have been followed in the original contract) see *People* vs. *Swift,* 31 Cal. at page 28.

a. DOCTRINE OF MUTUALITY IN RATIFICATION. FOR A PARTY TO PROFIT BY RATIFICATION HE MUST BE A PARTY TO THE ACT OF RATIFICATION.

See *Brady* vs. *The Mayor, etc. of New York,* 16 How. Pr. (N. Y.) 432, at page 441 (supra, page 70).

2. THERE IS SOME LOOSE LANGUAGE IN THE EARLY CASES TO THE EFFECT THAT IF THE ACT OF THE CITY *IS WITHIN ITS POWER,* BUT WRONGLY EXERCISED, IT MAY BE SUBSEQUENTLY RATIFIED BY ACTS *IN PAIS, i. e.,* THE DOCTRINE OF EQUITABLE ESTOPPEL MAY BE INVOKED. BUT THE BETTER

DOCTRINE IS THE ABOVE DESCRIBED RULE OF THE RATIFICATION STRICTLY FOLLOWING THE PROPER PROCEDURE.

Justice Cope, in the *Argenti* case, page 272, cites *Lucas Turner & Co.* vs. *City of San Francisco,* 7 Cal. 463. That was a case to recover from the City for street work done and there is much dicta to effect that:

1st. If contract of City is without its powers it can not in any way be ratified subsequently.

2nd. If within its powers, but wrongfully exercised, it may be subsequently ratified *by ordinance in accordance with procedure laid down in charter,* but

3rd. Not by matters *in pais.*

Justice Cope, in the Argenti case, pages 272-3, says that this is dicta and that if case stands for anything at all on these points it is by reason of the concurring opinion of Chief Justice Murry and Justice Terry, that a municipal corporation *can be bound by acts in pais,* as a ratification of a precedent act wrongly carried out. The case went off on a question of pleadings.

In *Pixley* vs. *W. R. R. R. Co.,* 33 Cal. at page 191, Currey, Chief Justice, cites the *Argenti* case as to point of ratification.

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